



**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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IN RE MERRILL LYNCH & CO., INC.	:	Master File No.
SECURITIES, DERIVATIVE & ERISA	:	07-cv-9633 (JSR)(DFE)
LITIGATION	:	
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This Document Relates To:	:	
ERISA Action, 07-cv-10268 (JSR)(DFE)	:	
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**STIPULATION AND AGREEMENT OF SETTLEMENT  
ERISA ACTION**

This Stipulation and Agreement of Settlement – ERISA Action (the “*Stipulation*”) is submitted in the above-captioned *In re Merrill Lynch & Co., Inc. Securities, Derivative and ERISA Litigation*, Master File No. 07-cv-9633 (JSR)(DFE), Case No. 07-cv-10268 (JSR)(DFE) (hereinafter, the “*ERISA Action*”), pursuant to Rule 23 of the Federal Rules of Civil Procedure. Subject to the approval of the United States District Court for the Southern District of New York (the “*Court*”), this *Stipulation* is entered into among named plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro (together, “*Named Plaintiffs*”) on behalf of themselves and the *Class* (as defined in Paragraph 1.3), on the one hand, and Merrill Lynch & Co., Inc. (“*Merrill Lynch*”), on the other.

A separate consolidated class action brought under the federal securities laws coordinated in the above-captioned *In re Merrill Lynch & Co., Inc. Securities, Derivative and ERISA Litigation*, Master File No. 07-cv-9633 (JSR)(DFE), identified as *In re Merrill Lynch & Co., Inc. Securities Action*, 07-cv-9633 (JSR)(DFE) (the “*Securities Action*”), is also pending in this *Court*. The

*Securities Action* is being settled contemporaneously herewith pursuant to a separate stipulation of settlement. It is a condition to the *Settlement* (as defined in Paragraph 1.43) that the *ERISA Action* and the *Securities Action* be settled contemporaneously and that the *Settlement* and the settlement of the *Securities Action* be approved by the *Court*.

WHEREAS:

A. Beginning on November 9, 2007, several putative class actions were filed in the *Court* against *Merrill Lynch* and various other defendants alleging violations of the Employee Retirement Income Security Act (“ERISA”). On March 12, 2008, the *Court* consolidated these actions into the *ERISA Action*, and appointed Keller Rohrback, L.L.P., and Cohen, Milstein, Sellers & Toll, PLLC<sup>1</sup> as interim co-lead counsel (“*Co-Lead Counsel*”) to manage the prosecution of the *ERISA Action* on behalf of the putative class.

B. *Named Plaintiffs* filed a Consolidated Amended Complaint for Violations of the Employee Retirement Income Security Act on May 21, 2008, and a Consolidated Supplemental Complaint for Violations of the Employee Retirement Income Security Act (the “*Complaint*”) on September 23, 2008. The *Complaint* asserts, on behalf of all persons, other than *Defendants*, who were participants in or beneficiaries of the Merrill Lynch & Co., Inc. 401(k) Savings and Investment Plan, the Merrill Lynch & Co., Inc. Retirement Accumulation Plan, or the Merrill Lynch & Co., Inc. Employee Stock Ownership Plan at any time between September 25, 2006 to the present, and whose accounts included investments in *Merrill Lynch* stock, claims under Sections 502(a)(2) and 502(a)(3) of ERISA, including claims for breaches of the fiduciary duties of prudence and loyalty, failure to monitor and co-fiduciary liability.

C. *Defendants* deny any wrongdoing whatsoever, and this *Stipulation* shall in no event

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<sup>1</sup> Known at the time of appointment as Cohen, Milstein, Hausfeld & Toll P.L.L.C.

be construed or deemed to be evidence of or an admission or concession, on the part of any *Defendant* with respect to any claim of any fault or liability or wrongdoing or damage whatsoever, or any infirmity in the defenses that the *Defendants* have asserted or would assert.

D. The parties to this *Stipulation* recognize that the *ERISA Action* has been filed by the *Named Plaintiffs* and defended by the *Defendants* in good faith, that the *ERISA Action* is being voluntarily settled upon advice of counsel, and that the terms of the *Settlement* are fair, reasonable and adequate. This *Stipulation* shall not be construed or deemed to be a concession by *Named Plaintiffs* or any *Class Member* of any infirmity in the claims asserted in the *ERISA Action* or any other action, or deemed to be evidence of any such infirmity.

E. *Co-Lead Counsel* have conducted investigations relating to the claims and the underlying events and transactions alleged in the *ERISA Action*. *Co-Lead Counsel* have analyzed the evidence adduced in connection with the *ERISA Action*, including during confirmatory discovery, and have researched the applicable law with respect to the claims of the *Named Plaintiffs* and the *Class* against the *Defendants* and the potential defenses thereto.

F. *Named Plaintiffs* in the *ERISA Action*, through *Co-Lead Counsel*, conducted personal and telephonic discussions and arm's-length negotiations with *Defendants*' counsel with respect to a compromise and settlement of the *ERISA Action*. These discussions and negotiations resulted in the execution of a Settlement Term Sheet on January 7, 2009 (the "*Term Sheet*"), which set forth the principal terms of the settlement of the *ERISA Action*, subject to confirmatory discovery to assess the adequacy and reasonableness of such settlement.

G. *Merrill Lynch* considers that, in order for it to achieve an end to litigation, it is a necessary condition to the settlement of the *ERISA Action* that the *Court* contemporaneously approve the separate settlement reached with respect to the *Securities Action*.

H. Based upon their investigation as well as informal and confirmatory discovery, *Named Plaintiffs* and *Co-Lead Counsel* have concluded that the terms and conditions of this *Stipulation*, which include the terms contained in the *Term Sheet* together with supplementary terms and conditions set forth herein, are fair, reasonable and adequate to *Named Plaintiffs* and the *Class*, and are in their best interests, and *Named Plaintiffs* have agreed to settle the claims raised in the *ERISA Action* pursuant to the terms and provisions of this *Stipulation*, after considering (a) the substantial benefits that the members of the *Class* will receive from settlement of the *ERISA Action*, (b) the attendant risks of litigation, and (c) the desirability of permitting the *Settlement* to be consummated as provided by the terms of this *Stipulation*.

NOW THEREFORE, without any admission or concession on the part of *Named Plaintiffs* of any lack of merit of the *ERISA Action* whatsoever, and without any admission or concession of any liability or wrongdoing or lack of merit in the defenses whatsoever by *Defendants*, it is hereby STIPULATED AND AGREED, by and between the parties to this *Stipulation*, through their respective counsel, subject to approval of the *Court* pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, in consideration of the benefits flowing to the parties hereto from the *Settlement* herein set forth, that all *Settled Claims* (as defined herein), as against the *Released Parties* (as defined herein), and all *Settled Defendants' Claims* (as defined herein) shall be compromised, settled, released and dismissed with prejudice, upon and subject to the following terms and conditions:

1. Definitions.

As used in this *Stipulation*, italicized and capitalized terms and phrases not otherwise defined herein have the meanings provided below:

1.1 “*Agreement Execution Date*” means the date on which this *Stipulation* is fully executed, as provided in Paragraph 10.19 below.

1.2 “*Alternative Judgment*” has the meaning set forth in Paragraph 8.1.5.

1.3 “*Class*” means, for the purposes of this *Settlement* only, a non-opt-out class consisting of (a) all current and former participants and beneficiaries of any of the *Plans* whose individual *Plan* account(s) included investments in *Merrill Lynch* stock at any time during the *Class Period* and (b) as to each *Person* within the scope of subsection (a) of this Paragraph 1.3, his, her or its beneficiaries, alternate payees (including spouses of deceased *Persons* who were participants of one or more of the *Plans*), *Representatives* and *Successors-In-Interest*, provided, however, that the *Class* shall not include any *Defendant* or any of their *Immediate Family*, beneficiaries, alternate payees (including spouses of deceased *Persons* who were *Plan* participants), *Representatives* or *Successors-In-Interest*, except for spouses and immediate family members who themselves are or were participants in any of the *Plans*, who shall be considered members of the *Class* with respect to their own *Plan* accounts.

1.4 “*Class Member*” means a member of the *Class*.

1.5 “*Class Notice*” means the forms of notice appended as Exhibits 1 and 2 to the form of *Order for Notice and Hearing*, attached hereto as Exhibit A.

1.6 “*Class Period*” means, for the purposes of this *Settlement* only, the period of time between September 30, 2006 and December 31, 2008, inclusive.

1.7 “*Co-Lead Counsel*” means Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll, PLLC.

1.8 “*Complaint*” means the Consolidated Supplemental Complaint for Violations of the Employee Retirement Income Security Act in the *ERISA Action*, filed September 23, 2008.

1.9 “*Court*” means the United States District Court for the Southern District of New York.

1.10 “*Custodian*” means (a) two or more individuals, one designated in writing by each *Co-Lead Counsel*, who execute an undertaking to be bound by the provisions of this *Stipulation* pertaining to the duties of the *Custodian*, or (b) a federally-insured financial institution proposed by *Co-Lead Counsel* and acceptable to *Defendants’ Counsel*. Either *Co-Lead Counsel* may change its designation at any time (and shall do so in the event the designee ceases to be a member of, partner in, or employee of, said *Co-Lead Counsel*) by executing a written instrument reflecting such change and delivering it to the other *Co-Lead Counsel*, with notice of such change provided to *Defendants’ Counsel*.

1.11 “*Defendants*” means (a) *Merrill Lynch* and (b) all persons named as defendants in the *Complaint*, whether named personally or fictitiously, who execute and deliver the *Individual Defendants Letter Agreement*.

1.12 “*Defendants’ Counsel*” means the law firm of Skadden, Arps, Slate, Meagher & Flom LLP, and *Individual Defendants’ Counsel*.

1.13 “*Derivative Actions*” means all actions consolidated into docket number 07-cv-9696 by order of the *Court* dated March 12, 2008.

1.14 “*Effective Date*” means the date, established pursuant to Paragraph 8.1, on which all of the conditions to settlement set forth in Paragraph 8.1 of this *Stipulation* have been fully satisfied or waived.

1.15 “*Fairness Hearing*” means the hearing to be held by the *Court* to determine, among other things, whether to grant final approval to the *Settlement*, as contemplated by the form of *Order for Notice and Hearing* attached hereto as Exhibit A.

1.16 “*Final*” or “*Finality*,” with respect to any *Judgment* or *Alternative Judgment* (both as defined herein) or any other order or judgment of a court of competent jurisdiction, means: (a) if no appeal is filed, the expiration date of the time provided by the corresponding rules of the applicable court or legislation for filing or noticing of any appeal therefrom; or (b) if there is an appeal therefrom, the date of (i) final dismissal of such appeal, or the final dismissal of any proceeding on certiorari or otherwise to review the *Judgment*, *Alternative Judgment*, judgment or order; or (ii) the date of final affirmance on an appeal thereof, the expiration of the time to file a petition for a writ of certiorari or other form of review, or the denial of a writ of certiorari or other form of review thereof, and, if certiorari or other form of review is granted, the date of final affirmance thereof following review pursuant to that grant. Any proceeding or order, or any appeal or petition for a writ of certiorari or other form of review pertaining solely to (i) any application for attorneys’ fees, costs or expenses, and/or (ii) the *Plan of Allocation*, shall not in any way delay or preclude the *Judgment* or *Alternative Judgment* from becoming *Final*.

1.17 “*Gross Settlement Fund*” shall have the meaning set forth in Paragraph 3.2.

1.18 “*Immediate Family*” means parents, grandparents, children and grandchildren.

1.19 “*Independent Fiduciary*” means a *Person* who may, at the election of *Merrill Lynch*, be appointed by the appropriate named fiduciary of the *Plan* or designated by an amendment to the applicable governing *Plan* document, whose fees and expenses (including the cost of counsel and other advisors) shall be paid by *Merrill Lynch* to consider whether to approve and authorize in writing the *Settlement* in accordance with Department of Labor Prohibited Transaction Class Exemption 2003-39.

1.20 “*Individual Defendants*” means all *Defendants* other than *Merrill Lynch*.



1.21 “*Individual Defendants’ Counsel*” means the law firms of Shearman & Sterling LLP and Simpson Thacher & Bartlett LLP.

1.22 “*Individual Defendants Letter Agreement*” or “*Letter Agreement*” means a letter agreement, in a form satisfactory to *Co-Lead Counsel* and *Individual Defendants’ Counsel*, to be executed within thirty (30) days of the date the *Court* grants preliminary approval to the *Settlement*, between, on the one hand, *Named Plaintiffs* on behalf of themselves and the *Class*, and on the other, *Individual Defendants*, through counsel for the foregoing, in which the *Individual Defendants* agree to be bound by the provisions of Paragraphs 1.49, 2.3, 5.1, 8.5, 9.1, 10.2, 10.3 and 10.14 of this *Stipulation*; acknowledge that they will be identified as “*Defendants*” (and not by name) in the *Class Notice*; consent that *Co-Lead Counsel* may identify them by name to any *Class Member* upon request, provided, however, that prior to disclosure, *Plaintiffs’ Counsel* has obtained written agreement from such *Class Member* to be bound by the terms of confidentiality agreements and orders that are binding on *Named Plaintiffs* and *Co-Lead Counsel*; and consent that they will not be included in the *Class* nor will they participate in any recovery pursuant to the *Settlement*, and in which *Named Plaintiffs*, on behalf of themselves and the *Class*, agree to be bound by Paragraphs 1.49, 2.2, 3.6, 8.5, 9.1, 10.2, 10.3, 10.14 of this *Stipulation*.

1.23 “*Judgment*” shall mean the Judgment contemplated by Paragraph 7.1. A proposed form of the *Judgment* is attached hereto as Exhibit B.

1.24 “*Merrill Lynch*” means Merrill Lynch & Co., Inc.

1.25 “*Named Plaintiffs*” means Plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro.

1.26 “*Net Settlement Fund*” has the meaning defined in Paragraph 3.3 hereof.

1.27 “*Notice*” means the “Notice of Proposed Settlement With Defendants, Motions for Attorneys’ Fees and Reimbursement of Expenses and Fairness Hearing”, which is to be sent to members of the *Class* substantially in the form attached hereto as Exhibit 1 to Exhibit A.

1.28 “*Order for Notice and Hearing*” means the order preliminarily approving the *Settlement* and directing notice thereof to the *Class* substantially in the form attached hereto as Exhibit A.

1.29 “*Parties*” means the *Plaintiffs* and the *Defendants*.

1.30 “*Person*” means an individual, partnership, corporation, governmental entity or any other form of entity or organization.

1.31 “*Plaintiffs*” means *Named Plaintiffs* and each member of the *Class*.

1.32 “*Plaintiffs’ Counsel*” means *Co-Lead Counsel* and any other counsel representing *Plaintiffs* and *Class Members*.

1.33 “*Plans*” shall mean the Merrill Lynch & Co., Inc. 401(k) Savings and Investment Plan; the Merrill Lynch & Co., Inc. Retirement Accumulation Plan; and the Merrill Lynch & Co., Inc. Employee Stock Ownership Plan, together with their *Predecessors* and *Successors-in-Interest*, and any trust created under such plans.

1.34 “*Plan of Allocation*” means a plan of allocation of the *Net Settlement Fund* as proposed by *Co-Lead Counsel* and approved by the *Court*.

1.35 “*Plan of Allocation Implementation Expenses*” means all expenses of implementing the *Plan of Allocation*, including the costs of gathering required data, performing required calculations and establishment of accounts in the *Plans* to receive allocations made with respect to former participants. *Plan of Allocation Implementation Expenses* will be paid by (or reimbursed

from) the *Gross Settlement Fund* to the extent of the first \$350,000 thereof, with any excess above such amount paid promptly by *Merill Lynch*.

1.36 “*Predecessor*” means as to any *Person* (the “Subject Person”), another *Person* as to whom the Subject Person is a *Successor in Interest*.

1.37 “*Publication Notice*” means the summary notice of proposed *Settlement* and hearing for publication substantially in the form attached as Exhibit 2 to Exhibit A.

1.38 “*Released Parties*” means any and all of the *Defendants*, every *Person* who, at any time during the *Class Period*, was a director, officer, employee or agent of *Merrill Lynch* or a trustee or fiduciary of any of the *Plans*, together with, for each of the foregoing, any *Predecessors*, *Successors-In-Interest*, present and former *Representatives*, direct or indirect parents and subsidiaries, affiliates, insurers, co-insurers, re-insurers, consultants, administrators, employee benefit plans, investment advisors, investment bankers, underwriters, and any *Person* that controls, is controlled by, or is under common control with any of the foregoing.

1.39 “*Representatives*” means attorneys, agents, directors, officers, and employees.

1.40 “*Securities Action*” means all actions consolidated into docket number 07-cv-9633 by order of the *Court* dated March 12, 2008.

1.41 “*Settled Claims*” means any and all claims, debts, demands, rights or causes of action, suits, matters, and issues or liabilities whatsoever (including, but not limited to, any claims for damages, interest, attorneys’ fees, expert or consulting fees, and any other costs, expenses or liability whatsoever), whether based on federal, state, local, statutory or common law or any other law, rule or regulation, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, whether class or individual in nature, including both known claims and *Unknown Claims* (as defined herein), against any of the *Released*

*Parties* (i) that have been asserted in the *ERISA Action*, or (ii) that could have been asserted in any forum by any *Class Member* or their successors and assigns which arise out of or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions out of which the claims asserted in the *ERISA Action* arise. Notwithstanding the foregoing, “*Settled Claims*” does not include any claims, rights or causes of action or liabilities whatsoever (i) related to the enforcement of the *Settlement*, including, without limitation, any of the terms of this *Stipulation* or orders or judgments issued by the courts in connection with the *Settlement* or confidentiality obligations; (ii) asserted in the *Securities Action* and not the subject of the settlement of the *ERISA Action*; or (iii) under ERISA Section 502(a)(1)(B) for individual or vested benefits brought by an individual *Plan* participant or beneficiary where such claims are unrelated to any claim, matter or cause of action that has been asserted in the *ERISA Action* or that could have been asserted in the *ERISA Action* or arising out of or based upon the allegations, transactions, facts, matters or occurrences, representations or omissions out of which the claims asserted in the *ERISA Action* arise.

1.42 “*Settled Defendants’ Claims*” means any and all claims, rights or causes of action or liabilities whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, including both known claims and *Unknown Claims*, that have been or could have been asserted in the *ERISA Action* or any forum by the *Defendants* or any of them or the successors and assigns of any of them against any of the *Named Plaintiffs*, any *Class Member* or their attorneys, which arise out of or relate in any way to the institution, prosecution, or settlement of the *ERISA Action*. *Settled Defendants’ Claims* does not include all claims, rights or causes of action or liabilities whatsoever related to the enforcement of the *Settlement*, including, without

limitation, any of the terms of this *Stipulation* or orders or judgments issued by the courts in connection with the *Settlement* or confidentiality obligations.

1.43 “*Settlement*” means the settlement of the *ERISA Action* contemplated by this *Stipulation*.

1.44 “*Settlement Amount*” means \$75,000,000.

1.45 “*Settlement Fund*” has the meaning set forth in Paragraph 3.1.

1.46 “*Stipulation*” means this Stipulation and Agreement of Settlement – ERISA Action.

1.47 “*Successor-In-Interest*” means a *Person*’s estate, legal representatives, heirs, successors or assigns, including successors or assigns that result from corporate mergers or other structural changes.

1.48 “*Taxes*” means (i) any and all applicable taxes, duties and similar charges imposed by a government authority (including any estimated taxes, interest or penalties) arising in any jurisdiction, if any, (A) with respect to the income or gains earned by or in respect of the *Gross Settlement Fund*, including, without limitation, any taxes that may be imposed upon *Defendants* or their counsel with respect to any income or gains earned by or in respect of the *Gross Settlement Fund* for any period during which it does not qualify as a Qualified Settlement Fund for federal or state income tax purposes; or (B) by way of withholding as required by applicable law on any distribution by the *Custodian* of any portion of the *Gross Settlement Fund* to any persons entitled thereto pursuant to this *Stipulation*; and (ii) any and all expenses, liabilities and costs incurred in connection with the taxation of the *Gross Settlement Fund* (including without limitation, expenses of tax attorneys and accountants). For the purposes of clause (i)(A) of this paragraph, taxes imposed on *Defendants* shall include amounts equivalent to taxes that would be payable by *Defendants* but for the existence of relief from taxes by virtue of loss carryforwards or other tax

attributes, determined by *Defendants*, acting reasonably, and accepted by the *Custodian*, acting reasonably.

1.49 “*Unknown Claims*” means any and all *Settled Claims* which any of the *Named Plaintiffs* or *Class Members* does not know or suspect to exist in his, her or its favor as of the *Effective Date* and any *Settled Defendants’ Claims* which any *Defendant* does not know or suspect to exist in his, her or its favor as of the *Effective Date*, which if known by him, her or it might have affected his, her or its decision(s) with respect to the *Settlement*. With respect to any and all *Settled Claims* and *Settled Defendants’ Claims*, the parties hereto, and the *Individual Defendants* in their *Letter Agreement*, stipulate and agree that upon the *Effective Date*, the *Named Plaintiffs* and the *Defendants* shall expressly waive, and each *Class Member* shall be deemed to have waived, and by operation of the *Judgment* shall have expressly waived, any and all provisions, rights and benefits conferred by any law of any state of the United States, or principle of common law or otherwise, which is similar, comparable, or equivalent to California Civil Code § 1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

*Named Plaintiffs* and *Defendants* (in the case of *Individual Defendants* by the execution of their *Letter Agreement*) acknowledge, and *Class Members* by operation of law shall be deemed to have acknowledged, that the inclusion of “*Unknown Claims*” in the definition of *Settled Claims* and *Settled Defendants’ Claims* was separately bargained for and was a key element of the *Settlement*.

## **2. SCOPE AND EFFECT OF SETTLEMENT**

2.1 The obligations incurred pursuant to this *Stipulation* shall be in full and final disposition of the *ERISA Action* as part of the *Settlement* and any and all *Settled Claims* as against all *Released Parties* and any and all *Settled Defendants’ Claims*.

2.2 Upon the *Effective Date* of the *Settlement*, *Named Plaintiffs* and all *Class Members* on behalf of themselves, their personal representatives, heirs, executors, administrators, trustees, successors and assigns, with respect to each and every *Settled Claim*, release and forever discharge, and are forever enjoined from prosecuting, any *Settled Claim* against any of the *Released Parties*, and shall not institute, continue, maintain or assert, either directly or indirectly, whether in the United States or elsewhere, on their own behalf or on behalf of any class or any other person or any of the *Plans*, any action, suit, cause of action, claim or demand against any *Released Party* or any other *Person* who may claim any form of contribution or indemnity from any *Released Party* in respect of any *Settled Claim* or any matter related thereto, at any time on or after the *Effective Date*. With respect to the injunction provided for in this Paragraph 2.2, no *Released Party* shall seek any remedy for violation thereof by any *Class Member* other than a *Named Plaintiff* until at least thirty (30) days after providing such *Class Member* with written notice of such injunction and demand to desist from any conduct in violation thereof.

2.3 Upon the *Effective Date* of the *Settlement*, *Merrill Lynch*, on behalf of itself, its trustees, successors and assigns, releases and forever discharges each and every one of the *Settled Defendants' Claims* against *Named Plaintiffs*, all *Class Members* and their respective counsel. Likewise, *Individual Defendants* in their *Letter Agreement* have agreed to release the *Settled Defendants Claims*, as a condition of the *Settlement*.

2.4 Amounts paid under the *Settlement* shall not constitute an offset or credit with respect to amounts to be paid in settlement of the *Securities Action*, nor shall amounts paid in settlement of the *Securities Action* constitute an offset or credit with respect to amounts payable in the *Settlement*.

### 3. **SETTLEMENT CONSIDERATION**

3.1 In consideration for the release and discharge provided for in Paragraph 2.2 hereof, on or before the tenth (10<sup>th</sup>) day following the date the *Stipulation* is fully executed, *Merrill Lynch* shall deliver by wire transfer \$75,000,000 into an interest-bearing escrow account established by *Co-Lead Counsel* for the *Settlement Amount* (the “*Settlement Fund*”).

3.2 The *Settlement Fund*, together with all interest earned from the date of preliminary approval of the *Settlement*, shall constitute the *Gross Settlement Fund*.

3.3 The *Gross Settlement Fund* shall be used to pay (i) all costs of *Notice, Publication Notice*, and administration costs referred to in Paragraph 4.2 hereof; and (ii) the attorneys’ fee and expense award referred to in Paragraph 5.1 hereof, and the *Named Plaintiff* case contribution awards, if any, referred to in Paragraph 5.1 hereof. The balance of the *Gross Settlement Fund* (inclusive of interest earned) after the matters described in clauses (i) and (ii) of this Paragraph, and after the payment of any *Taxes* (as defined herein) shall be the *Net Settlement Fund*.

3.4 At a time following the *Effective Date*, the *Net Settlement Fund* shall be transferred by the *Custodian* to the *Plans*, subject to a plan of allocation (the “*Plan of Allocation*”) to be proposed by *Co-Lead Counsel* and approved by the *Court*. All funds held by the *Custodian* shall be deemed to be in the custody of the *Court* held exclusively for the purposes described in Paragraphs 3.3 and 3.4 of this *Stipulation* until such time as the funds shall be distributed to the *Plans* or otherwise disbursed pursuant to this *Stipulation* and/or further order of the *Court*. The *Custodian* shall invest any funds in excess of \$250,000 in U.S. Treasury securities, securities issued by United States agencies or fully insured by the FDIC, deposits and certificates of deposit fully insured by the FDIC and backed by the full faith and credit of the U.S. Treasury, and short term debt or commercial paper fully guaranteed by the FDIC under the Temporary Liquidity



Guaranty Program and backed by the full faith and credit of the U.S. Treasury, and shall collect and reinvest in the *Net Settlement Fund* all earnings accrued thereon. Any funds held by the *Custodian* in an amount of less than \$250,000 may be held in a bank account or Certificates of Deposit insured by the Federal Deposit Insurance Corporation (“FDIC”) or may be invested as funds in excess of \$250,000 are invested. The parties hereto agree that the *Gross Settlement Fund* is intended to be a Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1, and that the *Custodian* as administrator of the Gross Settlement Fund within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall be responsible for filing tax returns and any other tax reporting for or in respect of the *Gross Settlement Fund* and paying from the *Gross Settlement Fund* any Taxes owed with respect to the *Gross Settlement Fund*. The parties hereto agree that the *Gross Settlement Fund* shall be treated as a Qualified Settlement Fund from the earliest date possible, and agree to any relation-back election required to treat the *Gross Settlement Fund* as a Qualified Settlement Fund from the earliest date possible. *Merrill Lynch* agrees to provide promptly to the *Custodian* the statement described in Treasury Regulation § 1.468B-3(e).

3.5 All Taxes (as defined herein) shall be paid out of the *Gross Settlement Fund*, shall be considered to be a cost of administration of the *Settlement* and shall be timely paid by the *Custodian* without prior order of the *Court*. The *Custodian* shall, to the extent required by law, be obligated to withhold from any distributions to any person entitled thereto pursuant to this *Stipulation* any funds necessary to pay Taxes including the establishment of adequate reserves for Taxes as well as any amount that may be required to be withheld under Treasury Reg. 1.468B-1(1)(2) or otherwise under applicable law in respect of such distributions. *Co-Lead Counsel* shall provide to *Defendants’ Counsel* copies of all tax returns filed with respect to the *Gross Settlement Fund* promptly upon the filing thereof, and evidence of the payment of Taxes as

and when all such payments are made. Further, the *Gross Settlement Fund* shall hold harmless the *Defendants* and their counsel for *Taxes* (including, without limitation, taxes payable by reason of any such indemnification payments).

3.6 None of the *Defendants*, the *Released Parties* or their respective counsel shall have any responsibility for or liability whatsoever with respect to (i) any act, omission or determination of *Co-Lead Counsel* or the *Custodian*, or any of their respective designees or agents, in connection with the administration of the *Settlement* or otherwise; (ii) the management, investment or distribution of the *Gross Settlement Fund*; (iii) the formulation, design or terms of the *Plan of Allocation*; (iv) the determination, administration, calculation or payment of any claims asserted against the *Gross Settlement Fund*; (v) any losses suffered by, or fluctuations in the value of, the *Gross Settlement Fund*; or (vi) the payment or withholding of any *Taxes*, expenses and/or costs incurred in connection with the taxation of the *Gross Settlement Fund* or the filing of any returns.

#### **4. ADMINISTRATION**

4.1 The *Custodian*, acting solely in its capacity as *Custodian*, shall be subject to the jurisdiction of the *Court*.

4.2 Following entry of the *Order for Notice and Hearing*, the *Custodian* may pay from the *Gross Settlement Fund*, without further approval from the *Court* or *Defendants*, (a) all reasonable costs and expenses up to the amount of \$250,000 associated with identifying and notifying the *Class Members* and effecting mailing of the *Notice* and publication of the *Publication Notice* as ordered by the *Court*, and the administration of the *Settlement*, including without limitation, the actual costs of printing and mailing the *Notice* and publication of the *Publication Notice*, and (b) *Taxes*. Notwithstanding the foregoing, the *Custodian* shall not make

any payment pursuant to clause (a) of the immediately preceding sentence that would cause the aggregate payments made under such clause (a) exceed \$150,000 without first providing seven days' prior written notice to *Defendants' Counsel* of each such payment; if *Defendants' Counsel* shall object to any such payment, the *Custodian* shall not make the payment without further approval from the *Court*. In the event that the *Settlement* is terminated as provided for herein, the amounts expended pursuant to the first two sentences of this Paragraph 4.2 shall not be returned to the *Persons* who paid the *Settlement Amount*.

4.3 *Merrill Lynch* shall cooperate with *Co-Lead Counsel* to accomplish the *Notice* in accordance with the *Order for Notice and Hearing*. If *Merrill Lynch* is or its designee is the most cost effective provider of notice to the *Class*, the *Custodian* will utilize *Merrill Lynch* or its designee to provide notice unless there is good cause not to do so. If the mailing of *Notice* is to be performed by a third party vendor, *Merrill Lynch* shall cooperate reasonably to provide address information to such vendor in an electronic format accessible by such vendor, to the extent the address information exists in such a format or otherwise can be readily obtained.

4.4 The *Custodian* may rely upon any notice, certificate, instrument, request, paper or other document reasonably believed by it to be genuine and to have been made, sent or signed by an authorized signatory in accordance with this *Stipulation*, and shall not be liable for (and will be indemnified from the *Gross Settlement Fund* and held harmless from and against) any and all claims, actions, damages, costs (including reasonable attorneys' fees) and expenses claimed against or incurred by the *Custodian* for any action taken or omitted by it, consistent with the terms hereof concerning the *Gross Settlement Amount*, in connection with the performance by it of its duties pursuant to the provisions of this *Stipulation* or order of the courts, except for its gross negligence or willful misconduct. If the *Custodian* is uncertain as to its duties hereunder, the

*Custodian* may request that *Named Plaintiffs* (and, prior to the *Effective Date*, *Merrill Lynch*) sign a document which states the action or non-action to be taken by the *Custodian*. In the event the *Settlement* is terminated, as provided for herein, indemnified amounts and expenses incurred by the *Custodian* in connection with this paragraph shall not be returned to the *Persons* who paid the *Settlement Amount*.

4.5 *Plan of Allocation Implementation Expenses* shall be borne as described in Paragraph 1.35.

## **5. ATTORNEYS' FEES AND EXPENSES**

5.1 *Co-Lead Counsel* will apply to the *Court* for an award of attorneys' fees not to exceed 27.5% of the *Gross Settlement Fund*, and reimbursement of expenses payable from the *Gross Settlement Fund*, and shall further provide to the *Court*, as part of the motion for approval of the *Settlement*, all necessary information required by the *Court* concerning the total award of attorneys' fees and reimbursement of expenses to be payable from the *Gross Settlement Fund*. Such application shall be made prior to the deadline for objections to the *Settlement* and in accordance with such schedule as the *Court* may establish. *Co-Lead Counsel* may also apply to the *Court* for case contribution awards to *Named Plaintiffs* in an amount not to exceed \$5,000 per *Named Plaintiff*. *Defendants* will take no position with respect to any such applications for attorneys' fees or expenses, or *Named Plaintiffs* case contributions awards. Such amounts as are awarded by the *Court* to *Co-Lead Counsel* from the *Gross Settlement Fund* shall be payable by the *Custodian* immediately upon award, notwithstanding the existence of any timely filed objections thereto, or potential for appeal therefrom, or collateral attack on the *Settlement* or any part thereof, subject to *Plaintiffs' Counsel's* obligations to make appropriate refunds or repayments to the *Gross Settlement Fund* plus accrued interest at the same rate as is earned by the *Gross Settlement Fund*, if

and when, as a result of any appeal and/or further proceedings on remand, or successful collateral attack, the fee or cost award is reduced or reversed or for whatever reason the *Settlement* is terminated pursuant to Paragraphs 8.2 or 8.3 hereof; provided that *Plaintiffs' Counsel* other than *Co-Lead Counsel* shall, as a condition to receiving payment, execute an undertaking in a form satisfactory to *Co-Lead Counsel* and *Defendants' Counsel* acknowledging such refund or repayment obligation and providing adequate security therefor. *Defendants* shall have no obligations whatsoever with respect to any attorneys' fees or expenses incurred by *Plaintiffs' Counsel*, which shall be payable solely from the *Gross Settlement Fund*.

**6. TERMS OF ORDER FOR NOTICE AND HEARING**

6.1 Promptly after this *Stipulation* has been fully executed, *Co-Lead Counsel* shall apply to the *Court* for entry of the *Order for Notice and Hearing*, substantially in the form annexed hereto as Exhibit A, which Order shall, among other provisions, certify the *Class* for settlement purposes only.

6.2 The mailing or publication of the *Notice* and *Publication Notice* shall not occur until the *Order for Notice and Hearing* has been entered by the *Court*.

**7. TERMS OF ORDER AND FINAL JUDGMENT**

7.1 If the *Settlement* contemplated by this *Stipulation* is approved by the *Court*, *Co-Lead Counsel* and *Defendants' Counsel* shall request that a *Judgment* be entered substantially in the form annexed hereto as Exhibit B.

**8. EFFECTIVE DATE OF SETTLEMENT, WAIVER OR TERMINATION**

8.1 The "*Effective Date*" of the *Settlement* shall be the date when all the following conditions of settlement shall have occurred:

8.1.1 deposit into the *Settlement Fund* of the *Settlement Amount* in accordance with the provisions of Paragraph 3.1;

8.1.2 execution of the *Individual Defendants Letter Agreement* in a form acceptable to *Co-Lead Counsel*;

8.1.3 *Co-Lead Counsel's* written confirmation after completion of such additional confirmatory discovery as may be agreed to by the parties that the confirmatory discovery was adequate and that the *Settlement* is fair, reasonable and adequate.

8.1.4 final approval by the *Court* of the *Settlement*, following notice to the *Class* and a hearing, as prescribed by Rule 23 of the Federal Rules of Civil Procedure;

8.1.5 entry by the *Court* of the *Judgment* in all material respects in the form set forth in Exhibit B, and the *Judgment* becoming *Final*, or, in the event that the *Court* enters a judgment in a form other than that provided above ("*Alternative Judgment*") and none of the parties hereto elect to terminate this *Settlement*, the date that such *Alternative Judgment* becomes *Final*;

8.1.6 approval by the *Court* of the settlement in the *Securities Action*, entry of judgment, and such judgment becoming *Final*;

8.1.7 If the circumstances described in Paragraph 8.2 or 8.3 occur, the expiration of the time to exercise the termination rights provided in the applicable Paragraph(s) without the termination right being exercised.

8.2 *Named Plaintiffs* and *Defendants* shall each have the right to terminate the *Settlement* and thereby this *Stipulation* by providing written notice of their election to do so to one another within thirty (30) days of any of the following: (a) the *Court* declining to enter the *Order for Notice and Hearing* in any material respect; (b) the *Court* refusing to approve this *Settlement* as

set forth in this *Stipulation*; (c) the *Court* declining to enter the *Judgment* in any material respect or entering an *Alternative Judgment*; (d) the date upon which the *Judgment* or *Alternative Judgment* is modified or reversed in any material respect by any level of appellate court; or (e) the date upon which the settlement in the *Securities Action* is terminated.

8.3 Notwithstanding anything else in this *Stipulation*, *Merrill Lynch* may, in its sole and unfettered discretion, elect in writing to terminate the *Settlement* and this *Stipulation* on or before the tenth (10<sup>th</sup>) business day prior to the *Fairness Hearing* if the *Independent Fiduciary* has determined that it does not approve the *Settlement* or that it will not authorize the *Settlement* in writing as contemplated by Department of Labor Prohibited Transaction Class Exemption 2003-39.

8.4 If, prior to the ninety-first (91<sup>st</sup>) day after the *Effective Date*, a case is commenced by or against *Merrill Lynch* as debtor under Chapters 7 or 11 of Title 11 of the United States Code, then *Named Plaintiffs* shall have the right, exercisable by written notice from *Co-Lead Counsel* to *Defendants' Counsel* within fifteen (15) days after commencement of such case, to terminate the *Settlement*, whereupon the provisions of Paragraph 8.5 shall apply.

8.5 Except as otherwise provided herein, in the event the *Settlement* is terminated, the parties to this *Stipulation* and all *Released Persons* including *Individual Defendants* as agreed to in their *Letter Agreement* shall be deemed to have reverted to their respective status in the *ERISA Action* as of January 7, 2009, and the parties shall proceed in all respects as if this *Stipulation* and any related orders had not been entered. Furthermore, within ten (10) business days following any termination of this *Settlement*, the *Custodian* shall return to *Merrill Lynch* the *Settlement Amount* previously paid by *Merrill Lynch* together with any interest or other income earned thereon or in respect thereof, less any *Taxes* paid or due with respect to such income, less any amounts required

to be paid to the *Custodian* pursuant to this *Stipulation*, less any reasonable costs of administration and notice actually incurred and paid or payable from the *Settlement Fund* (as described in Paragraph 3.3 hereof), and less any applicable withholding taxes.

**9. NO ADMISSION OF WRONGDOING**

9.1 This *Stipulation*, whether or not consummated, and any proceedings taken pursuant to it:

9.1.1 shall not be offered or received against any of the *Defendants* as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of those *Defendants* with respect to the truth of any fact alleged by any of the *Plaintiffs* or the validity of any claim that has been or could have been asserted in the *ERISA Action* or in any litigation, or the deficiency of any defense that has been or could have been asserted in the *ERISA Action* or in any litigation, or of any liability, negligence, fault, or wrongdoing of the *Defendants*;

9.1.2 shall not be offered or received against the *Defendants* as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any of the *Defendants*;

9.1.3 shall not be offered or received against the *Defendants* as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the *Defendants*, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of this *Stipulation*; provided, however, that if this *Stipulation* is approved by the *Court*, the *Released Parties* may refer to it to effectuate the liability protection granted them hereunder;



9.1.4 shall not be construed against any of the *Defendants* as an admission or concession that the consideration to be given hereunder represents the amount that could be or would have been recovered after trial; and

9.1.5 shall not be construed as or received in evidence as an admission, concession or presumption against *Named Plaintiffs* or any of the *Class Members* that any of their claims are without merit, or that any defenses asserted by the *Defendants* have any merit, or that damages recoverable under the *ERISA Action* would not have exceeded the *Gross Settlement Fund*.

## **10. MISCELLANEOUS PROVISIONS**

10.1 All of the exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

10.2 If the *Court* requests or orders *Named Plaintiffs* or *Defendants* to supply non-privileged information in their possession as part of the *Court's* review of the *Settlement*, the *Named Plaintiffs* and *Merrill Lynch* agree to promptly provide such information to the *Court*. The *Individual Defendants* have agreed to do likewise in their *Letter Agreement*. If *Named Plaintiffs* deem it necessary for the *Defendants* to supply non-privileged information in their possession, and not otherwise available to the *Named Plaintiffs*, in order to respond to any timely filed objection or *Court* request/order, *Merrill Lynch* agrees to promptly provide such non-privileged information that has been reasonably requested. The *Individual Defendants* have agreed to do likewise in their *Letter Agreement*. If *Defendants* deem it necessary for the *Named Plaintiffs* to supply non-privileged information in their possession in order to respond to any objection or any inquiry from the *Independent Fiduciary* or the Department of Labor, the *Named Plaintiffs* agree to promptly provide such non-privileged information that has been reasonably requested.

10.3 The parties to this *Stipulation* intend the *Settlement* to be a final and complete resolution of all disputes asserted or which could be asserted by the *Class Members* against the *Released Parties* with respect to the *Settled Claims*. Accordingly, the *Parties* agree not to assert in any forum that the *ERISA Action* was brought by the *Plaintiffs* or defended by *Defendants* in bad faith or without a reasonable basis. The *Parties* hereto agree, and pursuant to a *Letter Agreement* the *Plaintiffs* and the *Individual Defendants* have also agreed, that they shall assert no claims of any violation of Rule 11 of the Federal Rules of Civil Procedure relating to the prosecution, defense, or settlement of the *ERISA Action*. The *Parties* agree that the amount paid and the other terms of the *Settlement* were negotiated at arm's-length in good faith by the *Parties*, and reflect a settlement that was reached voluntarily after consultation with experienced legal counsel.

10.4 This *Stipulation* may not be modified or amended, nor may any of its provisions be waived, except by a writing signed by all *Parties* or their successors-in-interest.

10.5 The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

10.6 The administration and consummation of the *Settlement* as embodied in this *Stipulation* shall be under the authority of the *Court*, and that *Court* shall retain jurisdiction for the purpose of entering orders providing for awards of attorneys' fees and expenses to *Co-Lead Counsel* and enforcing the terms of this *Stipulation*.

10.7 The waiver by one party of any breach of this *Stipulation* by any other party shall not be deemed a waiver of any other prior or subsequent breach of this *Stipulation*.

10.8 This *Stipulation* and its exhibits, and the *Individual Defendant Letter Agreement* constitute the entire agreement concerning the *Settlement* of the *ERISA Action*, and no

representations, warranties, or inducements have been made by any party hereto concerning this *Stipulation* or its exhibits other than those contained and memorialized in such documents.

10.9 This *Stipulation* may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

10.10 This *Stipulation* shall be binding upon, and inure to the benefit of, the successors and assigns of the *Parties*.

10.11 The construction and interpretation of this *Stipulation* shall be governed by the internal laws of the State of New York without regard to conflicts of laws, except to the extent that federal law of the United States requires that federal law governs.

10.12 This *Stipulation* shall not be construed more strictly against one party than another merely by virtue of the fact that it, or any part of it, may have been prepared by counsel for one of the *Parties*, it being recognized that it is the result of arm's-length negotiations between the *Parties* and all *Parties* have contributed substantially and materially to the preparation of this *Stipulation*.

10.13 All counsel and any other person executing this *Stipulation* and any of the exhibits hereto, or any related *Settlement* documents, warrant and represent that they have the full authority to do so and that they have the authority to take appropriate action required or permitted to be taken pursuant to the *Stipulation* to effectuate its terms.

10.14 The parties hereto agree to cooperate fully with one another in seeking *Court* approval of the *Order for Notice and Hearing*, the *Stipulation* and the *Settlement* and to promptly agree upon and execute all such other documentation as may be reasonably required to obtain final approval by the *Court* of the *Settlement*.

10.15 Any notice, demand, or other communication under this *Stipulation* (other than the *Class Notice*, or other notice given at the direction of the *Court*) shall be in writing and shall be

deemed duly given upon receipt if it is addressed to each of the intended recipients as set forth below and personally delivered, sent by registered or certified mail (postage prepaid), sent by confirmed facsimile, or delivered by reputable express overnight courier:

IF TO *NAMED PLAINTIFFS*:

Lynn Sarko  
Gary Gotto  
Derek Loeser  
Erin Riley  
Keller Rohrback L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Telephone: (206) 623-1900  
Facsimile: (206) 623-3384

Marc I. Machiz  
Cohen, Milstein, Sellers & Toll, PLLC  
255 South 17<sup>th</sup> Street  
Suite 1307  
Philadelphia, PA 19103  
Telephone: (267) 773-4682  
Facsimile: (267) 773-4690

Michelle C. Yau  
Cohen Milstein Sellers & Toll PLLC  
1100 New York Avenue NW  
Suite 500, West Tower  
Washington, D.C. 20005  
Telephone: 202.408.4600  
Facsimile: 202.408.4699

IF TO *Merrill Lynch*:

Jay B. Kasner  
Scott D. Musoff  
Skadden, Arps, Meagher & Flom LLP  
Four Times Square  
New York, New York 10036  
Telephone: (212) 735-3000  
Facsimile: (212) 735-2000

Any *Party* may change the address at which it is to receive notice by written notice delivered to the other *Parties* in the manner described above.

10.16 This *Stipulation* and the *Individual Defendant Letter Agreement* contain the entire agreement among the *Parties* thereto relating to this *Settlement*, and specifically supersede any settlement terms or settlement agreements relating to the *Defendants* that were previously agreed upon orally or in writing by any of the *Parties*.


10.17 This *Stipulation* may be executed by exchange of faxed or scanned executed signature pages, and any signature thereby transmitted for the purpose of executing this *Stipulation* shall be deemed an original signature for purposes of this *Stipulation*. This *Stipulation* may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

10.18 This *Stipulation* binds and inures to the benefit of the *Parties* hereto, their assigns, heirs, administrators, executors, and successors.

10.19 The date on which the final signature is affixed below shall be the *Agreement Execution Date*.

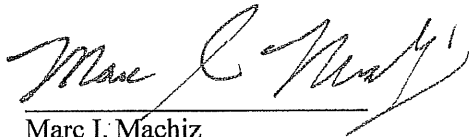
IN WITNESS WHEREOF, the *Parties* have executed this *Stipulation* on the dates set forth below.

FOR THE PLAINTIFFS:

By:   
FOR Lynn Sarko

Gary Gotto  
Derek Loeser  
Erin Riley  
Keller Rohrback L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Telephone: (206) 623-1900  
Facsimile: (206) 623-3384

Dated: 2-27-09

By:   
Marc I. Machiz

Michelle C. Yau  
Cohen, Milstein, Sellers & Toll, PLLC  
255 South 17<sup>th</sup> Street  
Suite 1307  
Philadelphia, PA 19103  
Telephone: (267) 773-4680  
Facsimile: (267) 773-4690


Dated: February 27, 2009

1100 New York Avenue NW  
Suite 500, West Tower  
Washington, D.C. 20005  
Telephone: 202.408.4600  
Facsimile: 202.408.4699

*Co-Lead Counsel for the Plaintiffs*

DEFENDANTS

By:


  
Jay B. Kasner  
Scott D. Musoff  
Skadden, Arps, Meagher & Flom LLP  
Four Times Square  
New York, New York 10036  
Telephone: (212) 735-3000  
Facsimile: (212) 735-2000

Dated:

February 27, 2009

*Attorneys for Merrill Lynch & Co., Inc.*

Acknowledged By:


  
Adam S. Hakki  
Shearman & Sterling LLP  
599 Lexington Avenue  
New York, New York 10022  
Telephone: (212) 848-4000  
Facsimile: (212) 848-7179

Dated:

February 27, 2009

*Attorneys for Individual Defendants Other than E. Stanley O'Neal*

Acknowledged By:

  
Michael J. Chepiga  
Simpson, Thacher & Bartlett LLP  
425 Lexington Ave  
New York, NY 10017-3954  
Phone: 212-455-2519  
Facsimile: 212-455-2502

Dated:

February 27, 2009

*Attorneys for E. Stanley O'Neal*

EXHIBITS TO THE STIPULATION AND AGREEMENT OF SETTLEMENT  
ERISA ACTION

Exhibits

A           Order for Notice and Hearing

B           Final Order and Judgment



**EXHIBIT A**  
**TO**  
**CLASS ACTION SETTLEMENT AGREEMENT**  
**(ORDER FOR NOTICE AND HEARING)**



Stipulation and Agreement of Settlement – ERISA Action dated February 27, 2009 (the “Settlement Agreement”), executed by Co-Lead Counsel and Defendants’ Counsel.

The Court has considered the proposed Settlement to determine, among other things, whether to certify a class for settlement purposes and whether the Settlement is sufficient to warrant the issuance of notice to members of the Class. Upon reviewing the Settlement Agreement and the Named Plaintiffs’ Motion for Order Preliminarily Approving Settlement, Preliminarily Certifying Settlement Class, Approving Notice Plan, and Setting Fairness Hearing Date, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Court preliminarily finds that the requirements of the United States Constitution, the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Southern District of New York, and any other applicable laws have been met as to the “Class” defined below, in that:

- a. The Class is cohesive and well defined;
- b. The members of the Class are ascertainable from records kept with respect to the Plans, and the members of the Class are so numerous that their joinder before the Court would be impracticable;
- c. Based on allegations in the Complaint, the Court preliminarily finds that there are one or more questions of fact and/or law common to the Class;

d. Based on allegations in the Complaint that the Defendants engaged in misconduct affecting members of the Class in a uniform manner, the Court finds that the claims of the Named Plaintiffs are typical of the claims of the Class;

e. The Named Plaintiffs will fairly and adequately protect the interests of the Class in that: (i) the interests of Named Plaintiffs and the nature of their alleged claims are consistent with those of the members of the Class; (ii) there appear to be no conflicts between or among Named Plaintiffs and the Class; and (iii) Named Plaintiffs and the members of the Class are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated ERISA class actions;

f. The prosecution of separate actions by individual members of the Class would create a risk of: (i) inconsistent or varying adjudications as to individual Class members that would establish incompatible standards of conduct for the parties opposing the claims asserted in the ERISA Action; or (ii) adjudications as to individual Class members that would, as a practical matter, be dispositive of the interests of the other Class members not parties to the adjudications, or substantially impair or impede the ability of those persons to protect their interests; and

g. Based on allegations in the Complaint that Defendants have acted or refused to act on grounds generally applicable to the Class, final injunctive, declaratory, or other equitable relief is appropriate with respect to the Class as a whole.

2. Based on the findings set out in paragraph 1 above, the Court preliminarily certifies the following class (the “Class”) for settlement purposes under Fed. R. Civ. P. 23(b)(1) and (2):

(a) all current and former participants and beneficiaries of any of the Plans whose individual Plan account(s) included investments in Merrill Lynch stock at any time between September 30, 2006 and December 31, 2008, inclusive and (b) as to each Person within the scope of subsection (a) of this Paragraph, his, her or its beneficiaries, alternate payees (including spouses of deceased Persons who were participants of one or more of the Plans), Representatives and Successors-In-Interest, provided, however, that the Class shall not include any Defendant or any of their Immediate Family, beneficiaries, alternate payees (including spouses of deceased Persons who were Plan participants), Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were participants in any of the Plans, who shall be considered members of the Class with respect to their own Plan accounts.

3. The Court preliminarily appoints Named Plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro as class representatives for the Class, and Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll PLLC as Co-Lead Counsel for the Class.

4. The Court preliminarily finds that the proposed Settlement should be approved as: (a) fair, reasonable and adequate; (b) the product of serious, informed, arm’s-length, and non-collusive negotiations; (c) having no obvious deficiencies; (d) not improperly granting preferential treatment to Class representatives or segments of the Class; (e) falling within the range of possible approval; and (f) warranting notice to Class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the proposed Settlement.

5. A hearing is scheduled for \_\_\_\_\_, 2009 (the “Fairness Hearing”) to determine, among other things:

a. whether the Settlement should be approved as fair, reasonable and adequate;

b. whether the litigation should be dismissed with prejudice;

c. whether the Notice and the Publication Notice and the means of disseminating same pursuant to the Settlement Agreement: (i) are appropriate and reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice; and (ii) meet all applicable requirements of the Federal Rules of Civil Procedure, and any other applicable law;

d. whether the application for attorneys’ fees and expenses filed by Co-Lead Counsel should be approved; and

e. whether the application for case contribution awards for the Named Plaintiffs should be approved.

6. The settling parties have presented to the Court a proposed form of Notice, which is appended hereto as Exhibit 1. With respect to such form of Notice, the Court finds that such Notice fairly and adequately: (a) describes the terms and effect of the Settlement; (b) notifies the Class concerning the proposed Plan of Allocation described in the Notice; (c) notifies the Class that Co-Lead Counsel will seek from the Gross Settlement Fund awards of attorneys fees and expenses, reimbursement of expenses, and case contribution awards for the Named Plaintiffs; (d) notifies the Class of the time and place of the Fairness Hearing; and (e) describes how the recipients of the

Notice may object to approval of the Settlement. The settling parties have proposed the following manner of disseminating the Notice to members of the Class, and the Court finds that such proposed manner of dissemination is the best notice practicable under the circumstances and directs that Co-Lead Counsel shall:

a. By no later than April 6, 2009, cause the Notice, with blanks completed and such non-substantive modifications thereto as may be agreed upon by the settling parties, to be mailed, by first-class mail, postage prepaid, to the last known address of each of the following persons who can be identified by reasonable effort: (i) each person within the Class; (ii) in cases of pending litigation, arbitration or other proceeding, if any, of any other claim against any of the Released Parties relating to any of the Settled Claims, all counsel known by Co-Lead Counsel to represent a member of the Class; (iii) all other counsel known by Co-Lead Counsel to represent a member of the Class; and (iv) the United States Department of Labor.

b. By no later than April 6, 2009, cause the Notice to be published on the website identified in the Notice.

c. By no later than April 6, 2009, cause the Publication Notice in the form attached hereto as Exhibit 2, with blanks completed and such non-substantive modifications thereto as may be agreed upon by the settling parties, to be published on at least one occasion in the New York Times (national edition) and by electronic publication on the Business Wire.

d. By no later than June 26, 2009, file with the Court and post on its website the motion for final approval of the Settlement and class certification, the

motion for approval of the Plan of Allocation and the motion for awards of attorneys' fees and cost reimbursements and Named Plaintiff case contribution awards described in the Notice.

At or before the Fairness Hearing, Co-Lead Counsel shall file with the Court a proof of timely compliance with the foregoing mailing and publication requirements.

7. Defendant Merrill Lynch & Co., Inc. shall reasonably cooperate with Co-Lead Counsel and the claims administrator in obtaining the information necessary to accomplish Notice provided for in paragraph 6, as provided in the Settlement Stipulation.

8. The Gross Settlement Fund shall constitute a Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1.

9. The Court will consider comments and/or objections to the Settlement, the Plan of Allocation, or the award of attorneys' fees and reimbursement of expenses or Named Plaintiff case contribution awards, only if such comments or objections and any supporting papers are served on or before July 6, 2009, upon each of the following:

**CO-LEAD COUNSEL:**

Lynn Lincoln Sarko  
Gary A. Gotto  
KELLER ROHRBACK L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Fax: (206) 623-3384

Marc I. Machiz  
Michelle C. Yau  
COHEN MILSTEIN SELLERS &  
TOLL PLLC  
1100 New York Avenue NW  
Suite 500, West Tower  
Washington, D.C. 20005  
Fax: (267) 773-4690



**DEFENDANTS' COUNSEL:**

Jay B. Kasner  
Scott D. Musoff  
SKADDEN, ARPS, MEAGHER &  
FLOM LLP  
Four Times Square  
New York, NY 10036  
Fax: (212) 735-2000

Adam S. Hakki  
SHEARMAN & STERLING LLP  
599 Lexington Avenue  
New York, NY 10022  
Fax: (212) 848-7179

and the objector has filed the objections, papers and briefs, showing due proof of service upon counsel identified above, with the Clerk of the Court, U.S. District Court, Southern District of New York, 500 Pearl Street, New York, NY 10007. Attendance at the hearing is not necessary; however, persons wishing to be heard orally in opposition to the approval of the Settlement, the Plan of Allocation, and/or Co-Lead Counsel's request for attorneys' fees or Named Plaintiff case contribution awards are required to state in their written objection their intention to appear at the hearing. Persons who intend to object to the Settlement, the Plan of Allocation, and/or Co-Lead Counsel's request for attorneys' fees or Named Plaintiff case contribution awards and desire to present evidence at the Fairness Hearing must include in their written objections the identity of any witness they may call to testify and exhibits they intend to introduce into evidence at the Fairness Hearing.

10. Any member of the Class or other person who does not timely file and serve a written objection complying with the terms of this paragraph shall be deemed to have waived, and shall be forever foreclosed from raising, any objection to the Settlement, and any untimely objection shall be barred.

11. Reasonable expenses up to \$250,000 incurred in implementing the provisions of paragraph 6 above pertaining to providing notice of the Settlement, as well as Taxes as provided for in the Settlement Agreement, shall be paid solely from the Gross Settlement Fund (including reimbursement to the Co-Lead Counsel from the Gross Settlement Fund upon notice to Defendants' counsel) pursuant to direction by Co-Lead Counsel, without further order of this Court.

12. Defendants' Counsel and Co-Lead Counsel shall promptly furnish each other with copies of any and all objections and notices of intention to appear at the Fairness Hearing that come into their possession.

13. This Order shall become null and void, and shall be without prejudice to the rights of the parties, all of whom shall be restored to their respective positions existing as of January 7, 2009 (pursuant to the provisions of paragraph 8.5 of the Settlement Agreement), if the Settlement is terminated under the terms of the Settlement Agreement. In such event, paragraph 8.5 of the Settlement Agreement shall govern the rights of the settling parties.

14. Under no circumstances shall this Order be construed, deemed or used as an admission, concession or declaration by or against any of the Defendants of any fault, wrongdoing, breach or liability. Nor shall the Order be construed, deemed or used as an admission, concession or declaration by or against Named Plaintiffs or the Class that their claims lack merit or that the relief requested in the ERISA Action is inappropriate, improper or unavailable, or as a waiver by any party of any defenses or claims he, she or it may have.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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The Honorable Jed S. Rakoff  
United States District Judge

**EXHIBIT 1**  
**TO**  
**ORDER PRELIMINARILY APPROVING SETTLEMENT AND**  
**CONFIRMING FINAL SETTLEMENT HEARING**

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**NOTICE OF PROPOSED SETTLEMENT OF ERISA CLASS ACTION  
LITIGATION, SETTLEMENT FAIRNESS HEARING, AND  
MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF  
EXPENSES AND PROPOSED NAMED PLAINTIFFS' COMPENSATION**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE MERRILL LYNCH & CO., INC.  
SECURITIES, DERIVATIVE AND ERISA  
LITIGATION

Master File No. 07-cv-9633 (JSR)(DFE)

This Document Relates To:  
ERISA ACTION

Case No. 07-cv-10268 (JSR)(DFE)

**NOTICE OF PROPOSED SETTLEMENT OF ERISA CLASS ACTION LITIGATION, SETTLEMENT FAIRNESS HEARING, AND  
MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AND PROPOSED NAMED PLAINTIFFS'  
COMPENSATION**

**Your legal rights might be affected if you are:**

- (a) a current or former participant in or beneficiary of any of the Merrill Lynch & Co., Inc. 401(k) Savings and Investment Plan, the Merrill Lynch & Co., Inc. Retirement Accumulation Plan or the Merrill Lynch & Co., Inc. Employee Stock Ownership Plan (which are referred to herein individually as a "Plan" and collectively as the "Plans"), and your individual Plan account(s) included investments in Merrill Lynch & Co., Inc. ("Merrill Lynch") stock at any time during the period September 30, 2006 and December 31, 2008, inclusive (the "Class Period") or
- (b) a beneficiary, alternate payee, representatives or successor in interest to a person described in clause (a).

**PLEASE READ THIS NOTICE CAREFULLY. A FEDERAL COURT AUTHORIZED THIS NOTICE. THIS IS NOT A  
SOLICITATION. YOU HAVE NOT BEEN SUED.**

This notice ("Notice") advises you of a proposed settlement (the "Settlement") of a consolidated class action lawsuit brought by plaintiffs Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro (collectively, the "Named Plaintiffs") on behalf of themselves, the Plans (referred to above), and as representatives of a class described herein (the "Settlement Class") against the Defendants (Merrill Lynch and the other persons named personally or fictitiously as defendants in the lawsuit). The Named Plaintiffs and the Defendants are referred to herein as the "Parties." The litigation is referred to as the "ERISA Action." The United States District Court for the Southern District of New York (the "Court") has preliminarily approved the Settlement, and has scheduled a hearing to evaluate the fairness and adequacy of the Settlement at which the Court will consider Named Plaintiffs' motion for final approval of the Settlement and for class certification, motion for approval of a proposed plan of allocation, and motion for an award of attorneys' fees and costs and for case contributions awards to the Named Plaintiffs. That hearing, before the Hon. Jed S. Rakoff, has been scheduled for \_\_\_\_\_, 2009, at \_\_\_\_m. in Courtroom \_\_\_\_, of the United States District Court for the Southern District of New York, 500 Pearl Street, New York, New York. The terms of the Settlement are contained in a Stipulation and Agreement of Settlement – ERISA Action (the "Settlement Agreement"), a copy of which is available at [www.merrilllynchERISAsettlement.com](http://www.merrilllynchERISAsettlement.com) or by contacting Plaintiffs' Co-Lead Counsel identified below. Capitalized terms used in this Notice and not defined herein have the meanings assigned to them in the Settlement Agreement. The Settlement will provide for payments to the Plans and for allocation of those payments to the accounts of, or otherwise for the benefit of, the Settlement Class. The Settlement is summarized below.

Any questions regarding the Settlement should be directed to Plaintiffs' Co-Lead Counsel: Lynn Lincoln Sarko, Keller Rohrback L.L.P., 1201 Third Avenue, Suite 3200, Seattle, WA 98101 or Marc Machiz, Cohen Milstein Sellers & Toll PLLC, 1100 New York Avenue NW, Suite 500, West Tower, Washington, D.C. 20005. Plaintiffs' Co-Lead Counsel have established a toll-free phone number, (\_\_\_\_) \_\_\_\_-\_\_\_\_, if you have questions or comments. Plaintiffs' Co-Lead Counsel may also be contacted via email ([info@merrilllynchERISAsettlement.com](mailto:info@merrilllynchERISAsettlement.com)). Please do not contact the Court. They will not be able to answer your questions.

**PLEASE READ THIS NOTICE CAREFULLY AND COMPLETELY. IF YOU ARE A MEMBER OF THE SETTLEMENT CLASS TO WHOM THIS NOTICE IS ADDRESSED, THE SETTLEMENT WILL AFFECT YOUR RIGHTS. YOU ARE NOT BEING SUED IN THIS MATTER. YOU DO NOT HAVE TO APPEAR IN COURT, AND YOU DO NOT HAVE TO HIRE AN ATTORNEY IN THIS CASE. IF YOU ARE IN FAVOR OF THE SETTLEMENT, YOU NEED NOT DO ANYTHING. IF YOU DISAPPROVE, YOU MAY OBJECT TO THE SETTLEMENT PURSUANT TO THE PROCEDURES DESCRIBED BELOW.**

**ACTIONS YOU MAY TAKE IN THE SETTLEMENT**

NO ACTION IS NECESSARY TO RECEIVE PAYMENT.	If the Settlement is approved by the Court and you are a member of the Settlement Class, you do not need to do anything in order to receive a payment. The portion, if any, of the Net Settlement Fund to be allocated to your Plan account or otherwise for your benefit will be calculated as part of the implementation of the Settlement. If you are a current participant in the Plans, any share of the Net Settlement Fund to which you are entitled will be deposited into your Plan accounts. If you are no longer a Plan participant and are entitled to share in the Net Settlement Fund, a Plan account will be established for you, if necessary, and you will be notified of such account.
YOU CAN OBJECT (NO LATER THAN _____, 2009).	If you wish to object to any part of the Settlement, you can write to the Court and counsel and explain why you do not like the Settlement.

YOU CAN GO TO THE HEARING ON _____, 2009	If you have submitted a written objection to the Court and counsel, as explained below, you can ask to speak in Court about the fairness of the Settlement.
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This litigation (the “Action”) is a consolidation of a series of cases filed in federal district court. As described in more detail below and in the complaints themselves, the cases concern allegations that Defendants breached fiduciary duties they owed to participants in the Plans. Copies of the Consolidated Supplemental Complaint for Violations of the Employment Retirement Income Security Act (“Complaint”) and other documents filed in this Action are available at [www.merrilllynchERISAsettlement.com](http://www.merrilllynchERISAsettlement.com).

### SUMMARY OF SETTLEMENT

A Gross Settlement Fund has been established consisting of a deposit of \$75,000,000.00 in cash paid by Merrill Lynch, plus interest earned thereon from and after \_\_\_\_\_, 2009. The Net Settlement Fund, which will consist of the Gross Settlement Fund less certain amounts described in the Settlement Agreement, including expenses associated with Class Notice, Court-approved attorneys’ fees and expenses and case contribution awards, taxes and other costs related to the administration of the Gross Settlement Fund and implementation of the Plan of Allocation, will be allocated among the Settlement Class in accordance with the Plan of Allocation to be approved by the Court. (See Section 4 below for details of the Plan of Allocation).

The Settlement Class consists of the following persons: (a) all current and former participants and beneficiaries of any of the Plans whose individual Plan account(s) included investments in Merrill Lynch stock at any time during the Class Period (i.e., September 30, 2006 through December 31, 2008, inclusive), and (b) as to each Person within the scope of subsection (a) of this paragraph, his, her or its beneficiaries, alternate payees (including spouses of deceased Persons who were participants of one or more of the Plans), Representatives and Successors-In-Interest, provided, however, that the Class shall not include any Defendant or any of their Immediate Family, beneficiaries, alternate payees (including spouses of deceased Persons who were Plan participants), Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were participants in any of the Plans, who shall be considered members of the Settlement Class with respect to their own Plan accounts.

As with any litigation, the Parties would face an uncertain outcome if this Action were to continue against the Defendants. Continued litigation of this Action against the Defendants could result in a judgment or verdict greater or less than the recovery under the Settlement Agreement, or in no recovery at all. This litigation has been hotly contested from the outset. Throughout this litigation, the Named Plaintiffs and the Defendants have disagreed on both liability and damages, and they do not agree on the amount that would be recoverable even if the Plaintiffs were to prevail at trial. The Defendants, among other things: (1) have denied, and continue to deny, the material allegations of the Complaint; (2) have denied, and continue to deny, any wrongdoing or liability whatsoever; (3) believe that they acted at all times reasonably and prudently and in accordance with applicable law with respect to the Plans, their participants and beneficiaries, and the Settlement Class; (4) would assert certain other defenses if this Settlement is not consummated; and (5) are entering into the Settlement solely to avoid the cost, disruption, and uncertainty of litigation. Nevertheless, the Parties have taken into account the uncertainty and risks inherent in this litigation, particularly its complex nature, and have concluded that it is desirable that this Action be fully and finally settled on the terms and conditions set forth in the Settlement Agreement.

Plaintiffs’ Counsel in this Action will apply to the Court for an order awarding Plaintiffs’ Counsel attorneys’ fees not in excess of 27.5% of the amount recovered in the Settlement, plus reimbursement of expenses. The Named Plaintiffs in this Action will share in the allocation of the money paid to the Plans on the same basis and to the same extent as all other members of the Class, except that, in addition, the Named Plaintiffs may apply to the Court for a case contribution award of up to \$5,000 each. Any case contribution award granted to the Named Plaintiffs by the Court will be payable from the proceeds of the Settlement.

### BASIC INFORMATION

#### 1. Why did I get this Notice package?

Either you or someone in your family may have been a participant in or beneficiary of one of the Plans and may have had a portion of your, his, or her Plan account(s) invested in Merrill Lynch stock during the Class Period. The Court has directed that this Notice be sent to you because, as a potential member of the Settlement Class, you have a right to know about the proposed Settlement with the Defendants before the Court decides whether to approve the Settlement. If the Court approves the Settlement, and all related objections and appeals are favorably resolved, the net amount of the Settlement Fund will be allocated among the Settlement Class according to a court-approved Plan of Allocation and the Released Parties will be released from all Settled Claims, as set forth in the Settlement Agreement.

This Notice explains the Action, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how you will receive your portion of the benefits. The purpose of this Notice is to inform you of a hearing (the “Fairness Hearing”) to be held by the Court to consider the fairness, reasonableness and adequacy of the proposed Settlement and to consider the application of Plaintiffs’ Counsel for their attorneys’ fees and reimbursement of litigation expenses as well as an application for case contribution awards to the Named Plaintiffs. The Fairness Hearing will be held at \_\_\_\_\_ :\_\_ p.m. on \_\_\_\_\_, 2009 before the Honorable Jed S. Rakoff in the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007, to determine:

- (a) Whether the Settlement should be approved as fair, reasonable, and adequate;
- (b) Whether the Complaint should be dismissed with prejudice pursuant to the terms of the Settlement;
- (c) Whether the Class Notice and the means of dissemination thereof pursuant to the Settlement Agreement: (i) are appropriate and reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice; and (ii) met all applicable requirements of the Federal Rules of Civil Procedure, and any other applicable law;
- (d) Whether the Settlement Class should be certified pursuant to Fed. R. Civ. P. 23(a) & (b) for purposes of the Settlement and, with respect thereto, whether Plaintiffs’ Co-Lead Counsel should be appointed as Class Counsel pursuant to Fed. R. Civ. P. 23(g);
- (e) Whether the application for attorneys’ fees and expenses filed by Plaintiffs’ Co-Lead Counsel should be approved; and
- (f) Whether the application for case contribution awards for the Named Plaintiffs should be approved.

The issuance of this Notice is not an expression of the Court’s opinion on the merits of any claim in this Action, and the Court still has to decide whether to approve the Settlement. If the Court approves the Settlement, payment to the Settlement Class will be made after all related appeals, if any, are favorably resolved. It is always uncertain whether such appeals can be favorably resolved, and resolving them can take time, perhaps more than a year. Please be patient.

## **2. What is the lawsuit about? What has happened so far?**

In this Action, Named Plaintiffs allege, among other things, that the Defendants were fiduciaries of the Plans and violated fiduciary duties under the Employee Retirement Income Security Act of 1974 (“ERISA”) by allowing the Plans to invest in Merrill Lynch stock when it was allegedly an unsuitable and imprudent investment for the Plans. Named Plaintiffs further allege that the Defendants violated ERISA by misrepresenting the true financial condition of the Company and, consequently, the true value and riskiness of Merrill Lynch stock, and by failing to discharge fiduciary duties to provide information pertinent to the Plans’ investment in Merrill Lynch stock to other fiduciaries, monitor the performance of other fiduciaries, or otherwise prevent or remedy breaches of duty by other fiduciaries. Plaintiffs sought to recover from the Defendants losses to the Plans allegedly caused by the Defendants’ alleged misconduct.

Defendants deny that they have any liability to the Plans or their participants or beneficiaries. If the litigation were to continue, Defendants would raise numerous defenses to liability, including the following:

- They were not fiduciaries of the Plans, or, if they were fiduciaries, their fiduciary duties did not extend to the matters at issue in the Action;
- To the extent they were fiduciaries as to the matters at issue in the Action, they fully discharged all fiduciary duties in a manner wholly consistent with ERISA and the applicable body of case law interpreting ERISA;
- Even if they failed to discharge one or more of their ERISA fiduciary duties, any such breach of fiduciary duty did not cause the losses alleged by Named Plaintiffs; and
- The relief sought by the Named Plaintiffs in the Action is not permitted under ERISA.

Plaintiffs’ Co-Lead Counsel have conducted an extensive investigation of Merrill Lynch and of the alleged losses suffered by the Plans as a result of the breaches of fiduciary duty alleged in the Action. In addition, through that investigation and through discovery of additional information in the Action, Plaintiffs’ Co-Lead Counsel have obtained extensive documents, including documents and materials governing the Plans, communications with Plan participants, internal Merrill Lynch documents regarding the Plans, Merrill Lynch’s Securities and Exchange Commission filings, press releases, public statements, news articles and other publications. Co-Lead Counsel have conducted a thorough review and analysis of these materials. In addition, because the Settlement was reached before formal discovery commenced in the Action, Plaintiffs’ Co-Lead Counsel have sought discovery of additional facts and documentation prior to the Fairness Hearing to enable Plaintiffs’ Co-Lead Counsel to confirm that the Settlement is fair, reasonable and adequate and in the best interest of the Settlement Class.

Plaintiffs’ Co-Lead Counsel have opposed a motion by Defendants to dismiss the Action for failure to state a claim upon which relief may be granted. This motion is fully briefed, and at the time the Settlement was reached was pending before the Court.

This Settlement is the product of intense, arm’s-length negotiations between Plaintiffs’ Co-Lead Counsel and Defendants’ Counsel, conducted during numerous meetings and conferences in which the terms of the Settlement were extensively debated and negotiated.

## **3. Why is this case a class action?**

In a class action, one or more plaintiffs, called “named plaintiffs,” sue on behalf of people who have similar claims. All of the individuals on whose behalf the Named Plaintiffs in this Action are suing are members of a “class” referred to in this Notice as members of the Settlement Class. The Court resolves the issues for all members of the Settlement Class. United States District Judge Jed S. Rakoff is presiding over this case.

## **4. Why is there a Settlement?**

The Court has not expressed any opinions or reached any decisions whatsoever on the merits of Named Plaintiffs’ claims against Defendants. Instead, the Named Plaintiffs and Defendants have agreed to a settlement to resolve the Action. In reaching the Settlement, they have avoided the cost and time of a trial. As with any litigation, the Named Plaintiffs would face an uncertain outcome if this case proceeded, including the risk of dismissal upon pending and future motions as well as the risk of not prevailing at trial. On the one hand, pursuing the case against the Defendants could result in a verdict offering relief greater than this Settlement. On the other hand, continuing the case against the Defendants could result in a verdict for less money than Named Plaintiffs have obtained in this Settlement, or even in no recovery at all. Based on these risks and an evaluation of the particular risks presented by this case, the Named Plaintiffs and Plaintiffs’ Co-Lead Counsel believe the Settlement is in the best interests of all Settlement Class members. Additional information concerning the Settlement and these factors is available in the motion for preliminary approval of the Settlement Agreement, which may be obtained at [www.merrilllynchERISAsettlement.com](http://www.merrilllynchERISAsettlement.com).

This Settlement is the product of extensive arm’s-length negotiations between Plaintiffs’ Co-Lead Counsel and the Defendants’ Counsel, all of whom are very experienced with respect to litigation of this type. Subject to completion of the confirmatory discovery process described above, Plaintiffs’ Co-Lead Counsel believe that the proposed Settlement is fair, reasonable and adequate and in the best interest of the Settlement Class.



## **5. How do I know whether I am part of the Settlement Class?**

The Court has preliminarily certified this Action as a class action. The Settlement Class consists of the following persons: (a) all current and former participants and beneficiaries of any of the Plans whose individual Plan account(s) included investments in Merrill Lynch stock at any time during the Class Period (i.e., September 30, 2006 through December 31, 2008, inclusive) and (b) as to each Person within the scope of subsection (a) of this paragraph, his, her or its beneficiaries, alternate payees (including spouses of deceased Persons who were participants of one or more of the Plans), Representatives and Successors-In-Interest, provided, however, that the Class shall not include any Defendant or any of their Immediate Family, beneficiaries, alternate payees (including spouses of deceased Persons who were Plan participants), Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were participants in any of the Plans, who shall be considered members of the Class with respect to their own Plan accounts.

If you are a member of the Settlement Class, your share of the Net Settlement Fund, if any, will be determined by the Court-approved Plan of Allocation, described in Section 7 below.

## **6. What does the Settlement provide?**

The Settlement Agreement provides for the payment of \$75,000,000.00 in cash, which has been deposited into a Gross Settlement Fund. The net amount in the Settlement Fund (including interest, but after payment of, and establishment of reserves for, certain amounts as described in the Settlement Agreement, including expenses associated with Class Notice, Court-approved attorneys' fees and expenses and Named Plaintiff case contribution awards, taxes and other costs related to the administration of the Settlement Fund and implementation of the Plan of Allocation) will be paid to the Plans and allocated among and paid to members of the Settlement Class according to a Plan of Allocation to be approved by the Court. Allocations will be made to Plan accounts established for members of the Settlement Class. Disbursement of the Settlement Fund to the Settlement Class will occur once the Settlement has become Final – after all appeals relating to the Settlement are favorably decided and all appeal periods have expired.

In exchange for the Settlement payment, all Settlement Class members and anyone claiming through them are deemed to fully release the Released Parties from Settled Claims, and are forever enjoined from bringing any Settled Claim against any Released Party. The Released Parties are defined in the Settlement Agreement; generally they are the Defendants and certain affiliated or otherwise related persons and entities. The Settled Claims, also defined in the Settlement Agreement, generally include, subject to certain limitations set forth in the Settlement Agreement, all claims asserted in the Action, as well as any claims that could have been asserted in any forum by or on behalf of Settlement Class members which arise out of or are based on the allegations, transactions, facts, matters or occurrences, representations or omissions out of which the claims in the Action arise. This means that Settlement Class members will not have the right to sue the Released Parties for any such claims if the Settlement is approved. The Settled Claims do not include the claims asserted in *In re Merrill Lynch Securities Litigation*, Case No. 07-cv-9633 (JSR)(DFE) (the "Securities Action"), and in *In re Merrill Lynch Derivative Litigation*, Case No. 07-cv-9696 (JSR)(DFE) (the "Derivative Action"), and actions consolidated thereunder, both pending in the United States District Court for the Southern District of New York, which are separate lawsuits and which are not affected by this Settlement. A proposed settlement of the Securities Action is currently pending and you may receive a separate notice with respect thereto. The Settlement of this Action is conditioned upon the settlement of the Securities Action being approved by the Court and that approval becoming Final.

## **7. What will be my share of the Settlement Fund?**

By June 26, 2009, Co-Lead Counsel will submit a detailed Plan of Allocation to the Court for approval at or after the Fairness Hearing. The Plan of Allocation, which, after filing, may be obtained at [www.merrilllynchERISAsettlement.com](http://www.merrilllynchERISAsettlement.com), or by contacting Co-Lead Counsel, will describe the manner by which the Settlement proceeds paid into the Plans (the "Net Settlement Fund") will be distributed to Settlement Class members. In general terms, the Plan of Allocation will provide that each Settlement Class member's share of the Net Settlement Fund will be calculated as follows:

The Net Proceeds shall be distributed among Settlement Class members in proportion to their "Net Losses." Each Class member's Net Loss will be the total of the member's "Merrill Lynch Common Stock Fund Net Loss," which will be, for each Settlement Class member, the greater of (a) zero, or (b) the result obtained by (i) taking \_\_\_% of the dollar amount of the Settlement Class member's Plan account balance invested in the Merrill Lynch Stock Fund at the beginning of the Class Period; (ii) adding the dollar amount added to the Settlement Class member's Plan account balance invested in the Merrill Lynch Stock Fund during the Class Period (including the value of Merrill Lynch common stock received as a dividend); and (iii) subtracting the dollar amount credited to the Settlement Class member's Plan account balance resulting from dispositions from the Merrill Lynch Stock Fund as well as the balance of any stock held in the Plan on the earlier of either the last day of the Class Period or on the last day the member was a participant in the Plan.

The Net Losses of the Settlement Class members will be aggregated. Each Settlement Class member will be assigned a "Net Loss Percentage," showing the percentage of the Settlement Class member's Net Loss in relation to all Settlement Class members' Net Losses. Each Settlement Class member's share of the Net Proceeds will be equal to the Net Proceeds multiplied by the member's Net Loss Percentage. If data is not available for the beginning date of the Class Period, then data from the nearest available date will be used.

The trustee or record keeper will perform all calculations for you and determine both whether you are entitled to a share of the Net Proceeds and your share amount. The trustee or record keeper will have access to all available records so you do not need to be concerned if you no longer have your Plan account statements. The Court will be asked to approve a more detailed statement of the Plan of Allocation, a copy of which will be available along with other settlement documents at [www.merrilllynchERISAsettlement.com](http://www.merrilllynchERISAsettlement.com).

## **8. How can I get my portion of the recovery?**

You do not need to file a claim for recovery. If you are a Settlement Class member entitled to a share of the Net Settlement Fund, your share will be deposited in your Plan account. If you are a former Plan participant, an account will be established for you in the Plan if necessary, and you will be notified of such account. If you are a former participant and have not provided the Plan with your current address, please contact the Plan administrator at Merrill Lynch immediately, or contact Plaintiffs' Co-Lead Counsel.

## **9. When would I receive my payment?**

Payment is conditioned on several matters, including the Court's approval of the Settlement and that approval becoming Final and no longer

subject to any appeals. Upon satisfaction of various conditions, the Net Settlement Fund will be allocated to Settlement Class members' Plan accounts or to accounts created for them pursuant to the Plan of Allocation (described above) as soon as possible after Final approval has been obtained for the Settlement, including the exhaustion of any appeals. Any appeal of the Final approval could take several years. Interest accrued on the Settlement Fund from \_\_\_\_\_, 2009 forward will be included in the amount allocated and paid to the Settlement Class. The Settlement Agreement may be terminated on several grounds, including if the Court does not approve or otherwise modifies the terms of the Settlement. If the Settlement Agreement is terminated, the Settlement will also be terminated, and the Action will proceed as if the Settlement had not been reached.

#### **10. Can I exclude myself from the Settlement?**

You do not have the option to exclude yourself from the Settlement. The Settlement Class was preliminarily certified under Federal Rule of Civil Procedure 23(b)(1) and (2) as a non-"opt-out" class because of the way ERISA operates. Breach of fiduciary duty claims under ERISA must be brought by participants on behalf of ERISA plans, and any judgment or resolution of such claims necessarily applies to all plan participants and beneficiaries. Thus, it is not possible for participants or beneficiaries to exclude themselves from the benefits of the Settlement. As a Settlement Class member, you will be bound by any judgments or orders that are entered in the Action for all claims that were asserted in the Action or otherwise included in the release under the Settlement. Although you cannot opt out of the Settlement, you can object to the Settlement and ask the Court not to approve it. See Answer to Question No. 13, below.

The above description of the operation of the Settlement is only a summary. The governing provisions are set forth in the Settlement Agreement (including its exhibits), which may be obtained at [www.merrillynchERISAsettlement.com](http://www.merrillynchERISAsettlement.com).

### **THE LAWYERS REPRESENTING YOU**

#### **11. Do I have a lawyer in the case?**

The Court has appointed the law firms of Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll, PLLC as Co-Lead Counsel for the Named Plaintiffs, the Plans, and the Settlement Class. You will not be charged directly by these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

#### **12. How will the lawyers be paid?**

Plaintiffs' Co-Lead Counsel will apply for an award of attorneys' fees and expenses on behalf of all Plaintiffs' counsel. The application for attorneys' fees will not exceed 27.5% of the Gross Settlement Fund. Any award of fees and additional expenses will be paid from the Settlement Fund prior to allocation and payment to the Settlement Class. The written application for fees and expenses, together with the application for case contribution payments to the Named Plaintiffs will be filed by June 26, 2009, and the Court will consider this application at the Fairness Hearing. A copy of the application will be available at [www.merrillynchERISAsettlement.com](http://www.merrillynchERISAsettlement.com) or by requesting a copy from Plaintiffs' Co-Lead counsel.

To date, neither Plaintiffs' Co-Lead Counsel nor any additional Plaintiffs' counsel have received any payment for their services in prosecuting this Action on behalf of the Settlement Class, nor have counsel been reimbursed for their out-of-pocket expenses. The fee requested by Plaintiffs' Counsel would compensate all of Plaintiffs' counsel for their efforts in achieving the Settlement for the benefit of the Settlement Class and for their risk in undertaking this representation on a contingency basis. The Court will determine the actual amount of the award.

### **OBJECTIONS**

#### **13. How do I tell the Court if I don't like the Settlement?**

Any member of the Settlement Class may appear at the Fairness Hearing and explain why they think the Settlement of the Action against the Defendants as embodied in the Settlement Agreement should not be approved as fair, reasonable and adequate and why a judgment should not be entered thereon, why the attorneys' fees and expenses should not be awarded, in whole or in part, or why the Named Plaintiffs should not be awarded a case contribution award, in whole or in part<sup>1</sup> provided, however, that no member of the Settlement Class shall be heard or entitled to contest these matters unless such Settlement Class member has filed with the Court written objections (which state all supporting bases and reasons for the objection, set forth proof of their membership in the Settlement Class, clearly identify any and all witnesses, documents and other evidence of any kind that are to be presented at the Fairness Hearing in connection with such objections, and further describe the substance of any testimony to be given by themselves as well as by any supporting witnesses).

To object, you must send a letter or other written statement saying that you object to the Settlement, the attorneys' fee award, and/or the case contribution awards in *In re Merrill Lynch ERISA Litigation*, Master File No. 07-cv-10268 (JSR)(DFE). Be sure to include your name, address, telephone number, signature, and a full explanation of all reasons you object to the Settlement. **Your written objection must be filed with the Court, and served upon the counsel listed below by no later than July 9, 2009:**

#### **File with the Clerk of the Court:**

Clerk of the Court  
United States District Court for the Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, New York, NY 10007-1312  
Re: Case No. 07-cv-10268 (JSR)(DFE)

**And, by the same date, serve copies of all such papers by mail and fax to each of the following:**

#### **ERISA PLAINTIFFS' CO-LEAD COUNSEL:**

<sup>1</sup> The case contribution award is that amount awarded by the Court in recognition of each of the Named Plaintiffs' assistance in prosecuting this Action. The precise amount of the award, if any, shall be determined by the Court at the Fairness Hearing. However, in no event will Plaintiffs' Counsel request more than \$5,000.00 per Named Plaintiff.

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**COUNSEL FOR DEFENDANTS:**

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**UNLESS OTHERWISE ORDERED BY THE COURT, ANY SETTLEMENT CLASS MEMBER WHO DOES NOT OBJECT IN THE MANNER DESCRIBED HEREIN WILL BE DEEMED TO HAVE WAIVED ANY OBJECTION AND SHALL BE FOREVER FORECLOSED FROM MAKING ANY OBJECTION TO THE PROPOSED SETTLEMENT AND THE APPLICATION FOR ATTORNEYS' FEES AND EXPENSES AND CASE CONTRIBUTION AWARDS.**

**THE COURT'S FAIRNESS HEARING**

**14. When and where will the Court decide whether to approve the Settlement?**

The Court will hold a Fairness Hearing at \_\_\_ .m. on \_\_\_\_\_, at the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007-1312.

**IF YOU DO NOT WISH TO OBJECT TO THE PROPOSED SETTLEMENT OR THE APPLICATION FOR ATTORNEYS' FEES AND EXPENSES AND CASE CONTRIBUTION AWARDS, YOU NEED NOT ATTEND THE FAIRNESS HEARING.**

At the hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. After the Fairness Hearing, the Court will decide whether to approve the Settlement and certify the Settlement Class. The Court will also consider the motions for attorneys' fees and expenses and case contribution awards to the Named Plaintiffs, as well as the proposed Plan of Allocation. We do not know how long these decisions will take.

**15. Do I have to come to the hearing?**

Plaintiffs' Co-Lead Counsel will answer questions Judge Rakoff may have at the Fairness Hearing. You are welcome to come at your own expense. If you send an objection, you do not have to come to Court to talk about it. As long as you mailed your written objection on time, it will be before the Court when the Court considers whether to approve the Settlement as fair, reasonable and adequate. You may also have your own lawyer attend the Fairness Hearing at your expense, but such attendance is not mandatory.

**16. May I speak at the hearing?**

If you are a member of the Settlement Class and you have filed a timely objection, if you wish to speak, present evidence or present testimony at the Fairness Hearing, you must state in your objection your intention to do so, and must identify any witnesses you intend to call or evidence you intend to present.

The Fairness Hearing may be rescheduled by the Court without further notice to the Class. If you wish to attend the Fairness Hearing, you should confirm the date and time with Co-Lead Counsel.

**IF YOU DO NOTHING**

**17. What happens if I do nothing at all?**

If you do nothing and you are a Settlement Class member, you will participate in the Settlement as described above in this Notice if the Settlement is approved, and you will be deemed to have released all Settled Claims against any of the Released Parties.

**GETTING MORE INFORMATION**

**18. How do I get more information?**

This Notice summarizes the proposed Settlement. Full details of the Settlement are set forth in the Settlement Agreement. You may obtain a copy of the Settlement Agreement by making a written request to a member of Co-Lead Counsel listed on Page \_\_. Copies of the Settlement Agreement, as well as the motion seeking preliminary approval of the Settlement Agreement, and the Preliminary Approval Order, may also be viewed at [www.merrilllyncherisasettlement.com](http://www.merrilllyncherisasettlement.com).

Plaintiffs' Counsel have established a toll-free phone number to receive your comments and questions, (\_\_\_\_) \_\_\_\_ - \_\_\_\_\_, and may also be contacted via email at [info@merrilllyncherisasettlement.com](mailto:info@merrilllyncherisasettlement.com).

DATED: \_\_\_\_\_, 2009.

By Order of the Court

**EXHIBIT 2**  
**TO**  
**ORDER PRELIMINARILY APPROVING SETTLEMENT AND**  
**CONFIRMING FINAL SETTLEMENT HEARING**

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**SUMMARY NOTICE OF SETTLEMENT FOR PUBLICATION**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE MERRILL LYNCH & CO., INC.  
SECURITIES, DERIVATIVE AND ERISA  
LITIGATION

This Document Relates To:  
ERISA ACTION

Master File No.  
07-cv-9633 (JSR)(DFE)

Case No. 07-cv-10268 (JSR)(DFE)

**TO ALL MEMBERS OF THE FOLLOWING CLASS:**

**ALL CURRENT OR FORMER PARTICIPANTS IN OR BENEFICIARIES OF THE MERRILL LYNCH & CO., INC. 401(K) SAVINGS AND INVESTMENT PLAN, THE MERRILL LYNCH & CO., INC. RETIREMENT ACCUMULATION PLAN OR THE MERRILL LYNCH & CO., INC. EMPLOYEE STOCK OWNERSHIP PLAN (WHICH ARE REFERRED TO HEREIN INDIVIDUALLY AS A “PLAN” AND COLLECTIVELY AS THE “PLANS”), WHOSE INDIVIDUAL PLAN ACCOUNT(S) INCLUDED INVESTMENTS IN MERRILL LYNCH & CO., INC. (“MERRILL LYNCH”) STOCK AT ANY TIME DURING THE PERIOD SEPTEMBER 30, 2006 AND DECEMBER 31, 2008, INCLUSIVE (THE “CLASS PERIOD”) AND ALL BENEFICIARIES, ALTERNATE PAYEES, REPRESENTATIVES, AND SUCCESSORS-IN-INTEREST OF ANY SUCH PERSON (COLLECTIVELY, THE “SETTLEMENT CLASS”).**

**PLEASE READ THIS NOTICE CAREFULLY.  
THIS IS A COURT-ORDERED LEGAL NOTICE.  
THIS IS NOT A SOLICITATION.**

A proposed Settlement has been preliminarily approved by a federal court in the above-captioned class action lawsuit alleging breaches of fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), in connection with the three employee benefit Plans listed above. The terms of the Settlement are contained in a Stipulation and Agreement of Settlement – ERISA Action (“Settlement Agreement”), dated \_\_\_\_\_, 2009 (the “Settlement Agreement”), a copy of which is available at [www.merrillynchERISAsettlement.com](http://www.merrillynchERISAsettlement.com) or by contacting Plaintiffs’ Co-Lead Counsel identified below. Capitalized terms used in this Publication

Notice and not defined herein have the meanings assigned to them in the Settlement Agreement.

The proposed Settlement provides for a payment of \$75 million to settle all claims against all Defendants. Under the proposed Settlement, the proceeds, net of expenses described in the Settlement Agreement (which include notice and administrative expenses, Court-approved attorneys' fees and expenses and Named Plaintiff case contribution awards, taxes and other costs related to the Settlement Fund administration) will be paid to the Plans and allocated to the Plan account(s) of members of the Settlement Class whose Plan account(s) suffered losses as the result of investing in Merrill Lynch stock during the Class Period in accordance with a Plan of Allocation as approved by the Court.

If you qualify, you will receive such an allocation. You do not need to submit a claim or take any other action unless you wish to object to the Settlement. The United States District Court for the Southern District of New York (the "Court") authorized this Notice.

**THE COURT WILL HOLD A HEARING AT \_\_: \_\_ .M. ON \_\_\_\_\_, 2009 TO DECIDE WHETHER TO APPROVE THE SETTLEMENT.**

**ADDITIONAL INFORMATION CONCERNING THE PROPOSED SETTLEMENT, INCLUDING THE NOTICE OF CLASS ACTION SETTLEMENT THAT HAS BEEN MAILED TO SETTLEMENT CLASS MEMBERS THAT EXPLAINS HOW CLASS MEMBERS CAN OBJECT TO THE SETTLEMENT AND THE SETTLEMENT AGREEMENT IS AVAILABLE AT WWW.MERRILLLYNCHSETTLEMENT.COM. IN ADDITION, CO-LEAD COUNSEL FOR THE PLAINTIFFS HAVE ESTABLISHED A TOLL-FREE NUMBER, ( ) - , AND EMAIL ADDRESS, INFO@MERRILLLYNCHERISASETTLEMENT.COM, TO ASSIST IN ANSWERING QUESTIONS REGARDING THE SETTLEMENT. YOU MAY ALSO CONTACT PLAINTIFFS' CO-LEAD COUNSEL AT:**

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Gary A. Gotto

Derek Loeser  
Erin Riley  
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COHEN MILSTEIN SELLERS & TOLL PLLC  
1100 New York Avenue NW  
Suite 500, West Tower  
Washington, D.C. 20005  
Facsimile: 202.408.4699

Please direct questions to Co-Lead Counsel, and not to the Court.

DATED: \_\_\_\_\_, 2009 \_\_\_\_\_ By Order of  
the Court



**EXHIBIT B**  
**TO**  
**CLASS ACTION SETTLEMENT AGREEMENT**  
**(ORDER AND FINAL JUDGMENT)**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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IN RE MERRILL LYNCH & CO., INC. : Master File No.  
SECURITIES, DERIVATIVE AND ERISA : 07-cv-9633 (JSR)(DFE)  
LITIGATION :  
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This Document Relates To: :  
ERISA Action, 07-cv-10268 (JSR)(DFE) :  
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**ORDER AND FINAL JUDGMENT**

This is a case brought under the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. (“ERISA”), claiming breach of fiduciary duty. Named Plaintiffs<sup>1</sup> filed a Consolidated Supplemental Complaint For Violations of the Employee Retirement Income Security Act (the “Complaint”) on September 23, 2008. A Stipulation and Agreement of Settlement – ERISA Action, dated February 27, 2009 (“Settlement Agreement”), was filed with the Court on February 27, 2009. Before the Court are: (1) Named Plaintiffs’ Motion for Final Approval of ERISA Class Action Settlement and For Settlement Class Certification (“Final Approval Motion”); (2) Named Plaintiffs’ Motion and Memorandum for Approval of Plan of Allocation (“Plan of Allocation Motion”); and (3) Co-Lead Counsel’s

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<sup>1</sup> The following individuals are named plaintiffs in this matter: Carl Esposito, Barbara Boland, Alan Maltzman, and Mary Gidaro (“Plaintiffs” or “Named Plaintiffs”).

Motion for Award of Attorneys' Fees and Expenses and Named Plaintiff Case Compensation Awards (collectively, the "Fees and Expenses Motion").<sup>2</sup>

On \_\_\_\_\_, 2009, the Court entered its Order Preliminarily Approving Settlement, Preliminarily Certifying Settlement Class, Approving Notice Plan, and Setting a Fairness Hearing Date ("Preliminary Approval Order"). The Court has received declarations attesting to the mailing of the Notice and publication of the Publication Notice in accordance with the Preliminary Approval Order. A hearing was held on \_\_\_\_\_, 2009 (the "Final Approval Hearing") to: (i) determine whether to grant the Final Approval Motion; (ii) determine whether to grant the Plan of Allocation Motion; (iii) determine whether to grant the Fees and Expenses Motion; and (iv) rule upon such other matters as the Court might deem appropriate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court has jurisdiction over the subject matter of this action, all members of the Class, and all Settling Defendants pursuant to 29 U.S.C. § 1132(e).
2. In accordance with Federal Rule of Civil Procedure 23 and the requirements of due process, the Class has been given proper and adequate notice of the Settlement, the Fairness Hearing, and the Plan of Allocation Motion, such notice having been carried out in accordance with the Preliminary Approval Order. The Notice, Publication Notice and notice methodology implemented pursuant to the Settlement Agreement and the Court's Preliminary Approval Order (a) were appropriate and reasonable and constituted due, adequate, and sufficient notice to all persons entitled to notice; and (b) met all applicable requirements of the Federal Rules of Civil Procedure and any other applicable law.

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<sup>2</sup> All capitalized terms used in this Order and Final Judgment and not defined herein shall have the meanings assigned to them in the Settlement Agreement.

3. The Settlement was negotiated at arm's-length by experienced counsel who were fully informed of the facts and circumstances of the action and of the strengths and weaknesses of their respective positions. The Settlement was reached after the Parties had fully briefed motions to dismiss and engaged in extensive negotiations. The parties exchanged information during the settlement negotiations, and have engaged in confirmatory discovery. Co-Lead Counsel and Defendants' Counsel are therefore well positioned to evaluate the benefits of the Settlement, taking into account the expense, risk, and uncertainty of protracted litigation over numerous questions of fact and law.

4. The Court finds that the requirements of the United States Constitution, the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Southern District of New York, and any other applicable laws have been met as to the "Class" defined below, in that:

- a. The Class is cohesive and well defined;
- b. The members of the Class are ascertainable from records kept with respect to the Plans, and the members of the Class are so numerous that their joinder before the Court would be impracticable;
- c. Based on allegations in the Complaint, the Court preliminarily finds that there are one or more questions of fact and/or law common to the Class.
- d. Based on allegations in the Complaint that the Defendants engaged in misconduct affecting members of the Class in a uniform manner, the Court finds that the claims of the Named Plaintiffs are typical of the claims of the Class;

- e. The Named Plaintiffs will fairly and adequately protect the interests of the Class in that: (i) the interests of Named Plaintiffs and the nature of their alleged claims are consistent with those of the members of the Class; (ii) there appear to be no conflicts between or among Named Plaintiffs and the Class; and (iii) Named Plaintiffs and the members of the Class are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated ERISA class actions;
- f. The prosecution of separate actions by individual members of the Class would create a risk of (i) inconsistent or varying adjudications as to individual Class members that would establish incompatible standards of conduct for the parties opposing the claims asserted in the ERISA Action or (ii) adjudications as to individual Class members that would, as a practical matter, be dispositive of the interests of the other Class members not parties to the adjudications, or substantially impair or impede the ability of those persons to protect their interests; and
- g. Based on allegations in the Complaint that Defendants have acted or refused to act on grounds generally applicable to the Class, final injunctive, declaratory, or other equitable relief is appropriate with respect to the Class as a whole.

5. Based on the findings set out in paragraph 4 above, the Court certifies the following class (the “Class”) for settlement purposes under Fed. R. Civ. P. 23(b)(1) and (2):

- (a) All current and former participants and beneficiaries of any of the Plans whose individual Plan account(s) included investments in Merrill Lynch stock at any time between September 30, 2006 and December 31, 2008, inclusive and (b) as to Person within the scope of subsection (a) of this Paragraph, his, her or its beneficiaries, alternate payees (including spouses of deceased Persons who were participants of one or more of the Plans), Representatives and Successors-In-Interest, provided, however,

that the Class shall not include any Defendant or any of their Immediate Family, beneficiaries, alternate payees (including spouses of deceased Persons who were Plan participants), Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were participants in any of the Plans, who shall be considered members of the Class with respect to their own Plan accounts.

6. The Court appoints Named Plaintiffs as class representatives for the Class, and Keller Rohrback L.L.P. and Cohen Milstein Sellers & Toll PLLC as Co-Lead Counsel for the Class.

7. The proposed Settlement warrants final approval pursuant to Federal Rule of Civil Procedure 23(e)(1)(A) and (C) because it is fair, adequate, and reasonable to the Class and others whom it affects based upon (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

8. The Settlement was intended by the parties thereto to be a contemporaneous exchange of value, and in fact constitutes such a contemporaneous exchange.

9. The Final Approval Motion is GRANTED, and the Settlement hereby is APPROVED as fair, reasonable, adequate to members of the Class, and in the public interest. The settling parties are directed to consummate the Settlement in accordance with the terms of the Settlement Agreement.

10. The Plan of Allocation is hereby APPROVED as fair, adequate, and reasonable. Upon or after the Effective Date of the Settlement, the Custodian shall, at the direction of Co-

Lead Counsel, disburse the Net Settlement Fund to the Plans for distribution by the Plans' trustee(s) in accordance with the Plan of Allocation, subject to any amounts withheld by the Custodian for the payment of taxes and related expenses as authorized in the Settlement Agreement, and attorneys fees and expenses and case contribution awards to Named Plaintiffs as authorized by this Order. The Court finds payments and distributions made in accordance with such Plan of Allocation to be "restorative payments" as defined in IRS Revenue Ruling 2002-45. Any modification or change in the Plan of Allocation that may hereafter be approved shall in no way disturb or affect this Judgment and shall be considered separate from this Judgment.

11. A case contribution award of \$ \_\_\_\_\_ payable from the Gross Settlement Fund is awarded to each Named Plaintiff. Such award may be distributed to each Named Plaintiff by the Custodian upon the Effective Date of the Settlement.

12. Co-Lead Counsel are hereby awarded attorneys' fees of \$ \_\_\_\_\_ and expenses of \$ \_\_\_\_\_. Such award may be distributed to Co-Lead Counsel by the Custodian upon the Effective Date of the Settlement.

13. The Court retains jurisdiction over this action and the Parties, the Plans, and members of the Class for all matters relating to this action, including (without limitation) the administration, interpretation, effectuation or enforcement of the Settlement Agreement and this Order and Final Judgment, and including any application for fees and expenses incurred in connection with administering and distributing the Settlement proceeds to members of the Class.

14. Without further order of the Court, the Parties may agree in writing to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

15. Named Plaintiffs and all members of the Class, on behalf of themselves, and the Class, and their personal representatives, heirs, executors, administrators, trustees, successors,

and assigns, with respect to each and every Settled Claim, fully, finally and forever release, relinquish and discharge, and are forever enjoined from prosecuting, any Settled Claim against any of the Released Parties, provided that, no Released Party shall seek any remedy for violation of the foregoing injunction by any Class Member other than a Named Plaintiff until at least thirty (30) days after having provided such Class Member with written notice of such injunction and demand to desist from any conduct in violation thereof.

16. The Defendants fully, finally, and forever release, relinquish, and discharge, and are forever enjoined from prosecuting, the Settled Defendants' Claims against Named Plaintiffs, all members of the Class, and their respective counsel.

17. All counts asserted in the ERISA Action are DISMISSED WITH PREJUDICE, without further order of the Court, pursuant to the terms of the Settlement Agreement.

18. In the event that the Settlement is terminated in accordance with the terms of the Settlement Agreement, this Judgment shall be null and void and shall be vacated nunc pro tunc, and paragraph 8.5 of the Settlement Agreement shall govern the rights of the Parties thereto.

SO ORDERED this \_\_\_ day of \_\_\_\_\_, 2009.

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HONORABLE JED S. RAKOFF  
UNITED STATES DISTRICT JUDGE